UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC d/b/a	)	
HAWAII TRIBUNE-HERALD	)	
	)	
Employer,	)	**CASE NOS. 37-CA-7043**
	)	**37-CA-7045**
	)	**37-CA-7046**
	)	**37-CA-7047**
AND	)	**37-CA-7048**
	)	**37-CA-7084**
	)	**37-CA-7085**
HAWAII NEWSPAPER GUILD,	)	**37-CA-7086**
LOCAL 39117,	)	**37-CA-7087**
COMMUNICATIONS WORKERS OF AMERICA,	)	**37-CA-7112**
AFL-CIO	)	**37-CA-7114**
	)	**37-CA-7115**
Union.	)	**37-CA-7186**
	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO THE RECOMMENDED DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

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I. JURISDICTIONAL STATEMENT

COMES NOW, Stephens Media, LLC, d/b/a Hawaii Tribune-Herald ("*Hawaii Tribune-Herald*"), the Respondent, pursuant to Section 102.46 of the National Labor Relations Board's ("the Board") Rules and Regulations, Series 8, as amended, with this Brief in Support of Exceptions to the March 6, 2008 Decision and Recommended Order of Administrative Law Judge ("ALJ") John J. McCarrick in NLRB Case No. 37-CA-7043 et al.

II. STATEMENT OF THE FACTS

Hawaii Tribune-Herald and the Hawaii Newspaper Guild, TNG-CWA, Local 39117 ("the Guild"), have had a collective bargaining relationship for decades. (Tr. 713)[1]. The parties have executed successor Collective Bargaining Agreements ("CBA") to memorialize wages, terms, and conditions of employment for a distinct group of represented employees. (Tr. 373; G.C. Ex. 17). In addition to the CBA, various policies have been created to govern the workplace. This case involves allegations pertaining to the CBA and policies at *Hawaii Tribune-Herald* which would have been arbitrated, but for the "broken" arbitration clause.

A. *HAWAII TRIBUNE-HERALD* MAINTAINS A NON-DISCRIMINATORY ACCESS POLICY.

Hawaii Tribune-Herald prints and publishes a daily newspaper from its Hilo, Hawaii location. The building is secure; the public enters the facility through the lobby (Tr. 1080, 1165). The lobby has security gates to prevent the public from wandering about the facility. (Tr. 877, 1164).

[1] References to the Transcript shall be designated "Tr." with the corresponding page(s). References to General Counsel's Exhibit(s) shall be designated "G.C. Ex." with the corresponding exhibit number(s). References to Respondent's Exhibit(s) shall be designated "R.Ex." with the corresponding exhibit number(s). References to ALJ Exhibit(s) shall be designated "ALJ Ex." with the corresponding exhibit number(s).

The Guild was aware of the company policy. (Tr. 416, 718-19; G.C. Ex. 32). On February 17, 2004, Publisher Ted Dixon sent a letter to Guild Administrative Officer Wayne Cahill explaining that, in response to the union's request for "something in writing":

> The lobby area is set aside as public areas. Security gates were installed in 2003, and are meant to restrict the public to that area. All other areas of the plant are for employees only. The only exceptions to that are those that have pre-arranged business with the *Hawaii Tribune-Herald*.
>
> If you choose to enter our place of business to talk to employees of the *Hawaii Tribune-Herald* you must do so in the lobby area provided that they are on a break. I would prefer you do it on the outside which would cause the least amount of interference with those that are working.
>
> These efforts are being instituted to not only improve the security for my employees, but to help them perform their duties in a more professional manner. Thank you in advance for your cooperation.

(GC Ex.32). At no time was this letter grieved; similarly at no time was an unfair labor practice charged filed in response to this policy. (Tr. 843). Dixon's February 17, 2004 letter was nothing more than a reiteration of a policy explained by former Publisher Jim Wilson, which was memorialized in a July 17, 2003 memorandum.The activation of the gates took place Monday, July 21, 2003. (R. Ex. 347; Tr. 166). This policy was never grieved; similarly the Guild did not file an unfair labor practice charge.

In addition, on March 3, 2004, Publisher Ted Dixon issued an intra-office communication describing the internal security procedures expected of employees at the *Hawaii Tribune-Herald* (R. Ex. 330). This policy was never grieved. (Tr. 290).

B. KEN NAKAKURA, WITH THE ASSISTANCE OF EMPLOYEE KORYN NAKO, VIOLATES THE ACCESS POLICY.

On October 18, 2005, employee Koryn Nako provided unauthorized access to *Hawaii Tribune-Herald* to Guild representative (and non-employee) Ken Nakakura through the employee entrance located on the side of the building. (Tr. 210-212). According to Nako and

Nakakura, the two arranged, through a phone call, for Nakakura to enter *Hawaii Tribune-Herald* through the magnetically-locked employee entrance required an access card for entry. (Tr. 210, 298). Only supervisors and employees had access cards. (Tr. 298).

Prior to entering the facility, Nakakura asked Nako, "Is it okay for me to come in?" Nako said, "Yes" (Tr. 408), or "I guess so." (Tr. 212). In truth, Nako had no permission to permit Nakakura access. (Tr. 334, 1177). Nako testified that she did not want Nakakura to enter through the public lobby because of her fears that Nakakura would "cause a disruption." (Tr. 299).

Nako and Nakakura proceeded to the employee breakroom/lunchroom where the two discussed union issues. (Tr. 212). This room was inside the building, behind the security gates, and not open to the public. (G.C. Ex. 4; R.Ex. 352).

When Nakakura entered the building, supervisor Arlan Vierra witnessed the intrusion. (Tr. 924). Vierra called Editor David Bock to inform Bock that Nakakura had entered the building. (Tr. 925).

Bock asked Advertising Director Alice Sledge to accompany him to the breakroom, which she did. (Tr. 961). When the pair arrived, they saw Nakakura meeting with three employees – Koryn Nako, Hunter Bishop, and Sharon Maeda. (Tr. 961). Bock asked Nakakura who let him into the building, to which Nako sheepishly replied, "I did." (Tr. 411-12). At no time did anyone state they had permission from any member of management to permit Nakakura to be in the facility. (Tr. 417).

Bock politely told Nakakura:

> Well, Ken, I'm going to have to ask you to leave. You don't have an appointment to conduct a meeting of any kind here on the premises, you don't have prior permission, so I have to ask you to leave.

(Tr. 962, 1131). Bock further stated to Nakakura "you know, we have this policy regarding this issue of access, and Ted's talked to Wayne about that directly, you're probably aware of that, but if you aren't, feel free to call Ted." (*Id*). Bock escorted Nakakura out of the building through the employee entrance. (*Id*).

Bock returned to the breakroom, and asked Nako to accompany him to his office. (Tr. 964). Nako agreed and began to follow Bock. (Tr. 964). At that point, employee Bishop followed Bock and Nako and exclaimed in a loud voice, "I need to be in this meeting." (Tr. 964). In response, Bock stated, "You don't. This is not your concern." (Tr. 964). This exchange occurred near the breakroom. (Tr. 964).

Bock and Nako continued to walk towards Bock's office, and away from Bishop. (Tr. 964-65). At the corner of the newsroom, roughly near the desk of Cliff Panis, Bishop again attempted to interfere with Bock's attempt to privately meet with Nako and loudly stated, "Isn't this disciplinary? I need to be in this meeting." (Tr. 965). Bishop was agitated; his face was tense; his jaw was clinched; and his face was red. (Tr. 965). In response, Bock stated to Bishop, again, "This is not your concern, please mind your own business." (Tr. 966).

Bishop would not let the issue drop. Bishop followed Bock and Nako to nearly Bock's office, directly next to Meg Premo and next to the AV room. (Tr. 969). Bishop, again, confronted Bock and said in a loud voice, "Isn't this disciplinary?" (Tr. 967). Bishop was angry. His words distracted the regularly quiet Editorial Department. (Tr. 968).

Bishop yelled, "So you're not going to give me an answer," at which point Nako, who was behind Bock, stated "Hunter, that's okay; I will call you if I need you." (Tr. 968). Bishop's face was bright red. (Tr. 968). He looked as though he was seething. (*Id*). This was not the first

time Bishop had acted in this manner towards Bock and had been disciplined. (*Id;* R.Exs. 317, 318, 319, 322). Immediately thereafter, Bock entered his office with Nako. (Tr. 971-72).

Right after Nako entered Bock's office, Bishop went to his cubicle and telephoned Guild Administrative Officer Cahill. (Tr. 899-900). Bishop "was yelling over the phone about the situation that happened." (Tr. 900). Cahill took notes of his conversation with Bishop because the events constituted an "incident," that was "significant." (Tr. 1262-63). Cahill's two pages of notes reflected that Bishop informed Cahill that Bock, Koryn, and Bishop were "by Bock's office." (Tr. 1265).

In Bock's office, Bock asked Nako if she was aware of the company policy on access. (Tr. 971-72). Nako said that she "remembered something about it." (Tr. 972). Nako admitted, "[Y]eah I let [Nakakura] in the side entrance, the employee entrance." (Tr. 372). Bock stated that in addition to the access policy "there is also an arrangement between Ted Dixon and Wayne Cahill specifically regarding when union business is going to be conducted on the property." (Tr. 972). Nako acknowledged her awareness of this arrangement, as well. (Tr. 972-73).

Nako asked if she was going to be in trouble? Bock said, "he" would have to confer with Nako's supervisor, Bill Crawford. (Tr. 973). The meeting lasted approximately 5 to 10 minutes. (Tr. 972).

C. THE EVENTS OF OCTOBER 19, 2005.

1. Hawaii Tribune-Herald *Suspends Hunter Bishop.*

At approximately 9:30 a.m., on October 19, 2005, Bishop met in Bock's office with Bock and Sledge. (Tr. 977). Bishop requested a witness, which was denied. (Tr. 977-78). Bock stated:

> I'm suspending you [Bishop] indefinitely without pay because of the rude, insubordinate, and confrontational behavior you displayed yesterday while I was trying to have a meeting with another employee. I warned you about that kind of behavior before. We've

> gone through arbitrations regarding this kind of behavior before. I'm not going to accept it. And, you know, you need to gather your things and leave the premises immediately.

(Tr. 978). Bishop did not respond in any way. (*Id*).

The same day, the Guild filed a grievance contesting Bishop's suspension. (G.C. Ex. 20). *Hawaii Tribune-Herald* denied the grievance. (G.C. Ex. 21).

2. Nako is Interviewed About Bishop's Behavior.

On that same day, Nako met with Business Manager Kathy Higaki, and Advertising Director Sledge in Higaki's office. (Tr. 1141-42). Nako did not protest the meeting. (Tr. 1141). Nako did not ask for a witness. (Tr. 1142).

Sledge asked Nako what she (Nako) remembered "about what happened the day before." (Tr. 1142). Nako described Bishop confronting Bock, and behaving in a rude, disrespectful, and disruptive manner. (Tr. 1143). Sledge took notes. (G.C. Ex. 6; Tr. 1143-44). Nako added her own words and adopted the statement. (*Id*). The meeting lasted approximately five minutes. (*Id*). The statement states:

> David said can I talk to you-
> Hunter was going to come in
> David said this is just a discussion
> Hunter said is it disciplinary
> Koryn said let it go-that's ok-don't worry about it
> Then Hunter backed off (added by Nako)
> During the meeting (added by Nako)
> Never asked David for Hunter or a witness. David just clarified policy.
> Koryn Nako 10/19/05
> Witnesses
> Alice Sledge 10/19/05
> Kathy Higaki 10/19/05

Nako voluntarily signed this statement. (Tr. 1145). The meeting, and the document that was prepared, were done at the advice of counsel to *Hawaii Tribune-Herald*. (Tr. 1141; 1145).

3. Hunter Bishop Admits that his Conduct Warranted his Termination.

On October 19, 2005, at 3:31 p.m., Bishop wrote an e-mail to Guild representative Cahill and CWA representative Michael Burrell, with the subject heading "what next." (R. Ex. 360 (rejected)). In this email, Bishop wrote, in relevant part, "I know I can be effective in the community and with the employees, who, as I've said before, need someone on the ground in Hilo they know they can rely on to be in Hilo at all times to help. ***I'm saying this based on my firm belief that I will be fired this time.***" (*Id.* (emphasis added)).

D. *HAWAII TRIBUNE-HERALD* INVESTIGATES NAKO'S BREACH OF THE ACCESS POLICY.

On October 21, 2005, Crawford asked Nako[2] to come into his office. (Tr. 1175). Bock also was in the office. Nako asked "am I in big trouble?" (Tr. 1175). Nako asked for a union witness and Crawford granted her a witness. (*Id*). She selected Dave Smith to be her witness. (*Id*).

In this meeting, Nako told Crawford that Nakakura did not meet to discuss union business (Tr. 340), that she was aware of the company policy regarding access (Tr. 1175-76; R. Ex. 330), that she had a copy of it (which she produced at the meeting (*Id.*), that she, personally, granted Nakakura access without any prior approval (Tr. 1176-77), and that Nakakura did not need to be in the building for any reason. (Tr. 1177). Nako explained that she had to give Nakakura a piece of paper. Crawford asked if the paper was "union related," and Nako

[2] Nako and Crawford are very good friends. Crawford described their working relationship as "very good. We had a great working relationship." (Tr. 1173). On a personal level, Crawford stated "if I was in a pinch and I needed someone to baby-sit my kids, she would be one of the first people I would call because I would trust her with that responsibility… So we were friends then, we are friends now, and we'll be friends after this." (Tr. 1174). Nako also acknowledged that she was friends with Crawford. (Tr. 288).

confirmed that it was. (Tr. 981). Upon learning that the paper was "union-related," Crawford did not ask Nako about the contents of the paper. (Tr. 984, 1178). At no time did Crawford ask Nako what were the contents of the piece of paper she gave to Nakakura. (*Id*).

Nako admitted she used bad judgment by permitting Nakakura access through the employee-only, side entrance, and she could have sent Nakakura the paper by mail or met him at the Guild's Hilo office. (Tr. 1178-79). Crawford informed Nako that he would get back to her regarding the results of his investigation. (*Id*). The meeting was cordial. (*Id*).

E. NAKO RECEIVES A WRITTEN WARNING LETTER.

On October 26, 2005, Crawford called Nako into his office, provided Nako with a letter, asked her to review it, and asked her if she had any questions about the letter. (Tr. 1179-81). The letter stated, in relevant part:

> This letter will confirm that I met you on Friday, October 21, 2005 to discuss your violation of Company policy.
>
> During our meeting, you admitted that you allowed non-employee, Ken Nakakura, past Company Security and into our building. You specifically, allowed Mr. Nakakura in the building through the back employee entrance.
>
> During our meeting, you acknowledged that you did not obtain advance permission to bring a non-employee in the building. During our meeting, you acknowledged that you used bad judgment. During our meeting, you further acknowledged that non-employee union representatives must contact *Hawaii Tribune-Herald* Management for an appointment prior to coming in the building.
>
> You also told us in this meeting that you let Mr. Nakakura in the building so you could give him some papers. However, during our meeting, you also acknowledged that you could have just as easily mailed the papers to Mr. Nakakura. You also acknowledged that Mr. Nakakura had no business to conduct or need to speak with anyone in Management on behalf of the union during this visit. Bottom line, you admitted that he had no need to be in the building.
>
> As much as you have acknowledged the use of bad judgment and were cooperative and candid during our investigation, I am only going to warn you about the incident. Under no circumstances should you allow non-employees into the building past our security without permission; more specifically, no one should ever be allowed in the back door,

which is for employees only. In the future, you should seek management permission to bring any non-employee into the building and, at that time, we will make a decision.

Should this type of misconduct occur again in the future, we will take disciplinary action appropriate to the circumstances.

(G.C. Ex. 7).

F. *HAWAII TRIBUNE-HERALD* TERMINATES HUNTER BISHOP.

On October 27, 2005, Editor Bock sent Bishop his termination letter after Bishop refused to come to the *Hawaii Tribune-Herald* facility. (Tr. 988-89; G.C. Ex. 2). In relevant part the letter stated:

> On October 19, 2005, you were suspended indefinitely without pay pending the completion of my investigation of your misconduct. Effective immediately, your indefinite suspension is converted to discharge.
>
> I have reviewed all the circumstances. I have also reviewed your entire disciplinary record with *Hawaii Tribune-Herald*.
>
> Specifically, we are discharging you because of your misconduct on October 18, 2005. You were disrespectful of supervisor authority, insubordinate and disruptive of my efforts to have a conversation with one of our employees. You engaged in this conduct in the presence of other employees, which makes this situation even more egregious. As I have told you many times over the years, it is your behavior that gets you in trouble.
>
> We have repeatedly used measured discipline in an effort to correct this behavior. Despite our repeated efforts, you have continued in this ongoing pattern of disrespect to management and insubordination. In view of all the circumstances, and your entire disciplinary record with *Hawaii Tribune-Herald*, I have decided to discharge you.

(G.C. Ex. 2). The "circumstances" referenced in the second paragraph referred to the incident on October 18, 2005. (Tr. 990). The "entire disciplinary record," referenced in the second paragraph referred to "prior disciplinary action *Hawaii Tribune-Herald* had taken against Bishop, including arbitration rulings, suspensions, warning letters, the whole thing." (Tr. 990).

Bishop's prior disciplinary record was impressive:

1. A July 1, 1999 reprimand for misconduct. (R.Ex. 6).

2. An August 27, 1999 one-day suspension for misconduct. (R.Ex. 8).

3. An April 25, 2002 written warning for insubordination. (R.Ex. 13).

4. A June 20, 2002 one-day unpaid suspension for misconduct. (R.Ex. 14).

5. A February 24, 2003 arbitration award upholding an April 25, 2002 witten warning. (R.Ex. 317).

6. A January 14, 2003 arbitration award concluding that Bishop was not disciplined (as alleged in the grievance), and finding that *Hawaii Tribune-Herald* ***did not violate the Act***. (R.Ex. 317)(emphasis added).

7. An April 19, 2003 arbitration award upholding a June 20, 2002 unpaid suspension for misconduct. (R.Ex. 319).

8. A February 8, 2006 arbitration award upholding a written warning for Bishop's poor productivity. (R.Ex. 321).

9. A February 9, 2006 arbitration award upholding discipline issued to Bishop for insubordination. (R.Ex. 322).

On November 3, 2005, the Guild amended Bishop's suspension grievance to include hi's discharge, and made a request for information, specifically asking "the exact reason for the suspension, including all information, written or verbal, that was considered in making the decision to discipline Mr. Bishop." (G.C. Ex. 22). The Guild asked:

1. Specifically, what did Mr. Bishop do that caused the company to suspend and then discharge him?

2. If Mr. Bishop violated a company policy or policies, please provide a copy of the policy or policies.

3. If other employees witness the event, please provide the Guild with a list of those employees.

4. If the company interviewed any employees in the course of an investigation of this matter, please provide a list of the employees interviewed and what information each employee provided.

5. Please provide a copy of Mr. Bishop's personnel file.

The Guild represented that it needed the information "so that it may discharge its duty to fairly represent Mr. Bishop and to determine whether or not the company is in compliance with the Collective Bargaining Agreement in connection with this matter." (*Id*).

On November 15, 2005, Bock, Crawford, Cahill, and employee Sharon Maeda met at the Naniloa Hotel for a Joint Conciliation and Arbitration Committee ("JCAC") meeting regarding Bishop's suspension and discharge. (Tr. 994-95). At that meeting, Cahill inquired what Bishop did that led to his termination. (Tr. 995). Bock informed Cahill that Bishop "had been insubordinate and confrontational and rude while [Bock] was trying to conduct a meeting with another employee. [Bock] told Mr. Cahill that Mr. Bishop, as he is well aware, had been warned about this kind of confrontational angry behavior on numerous occasions." (Tr. 995).

Cahill, at the meeting, asked for a list of witnesses to the confrontation; Bock informed him that he did not have a list of witnesses. (Tr. 996). Cahill asked what policies Bishop violated; Bock told Cahill that Bishop had violated "the policy of common sense, professional decorum." (Tr. 996). Bock further explained there were no policies prohibiting employees from slapping him at the office, but if it happened, it would be wrong. (Tr. 996). Bock explained that there was no direct policy that he could provide Cahill. (Tr. 996). Further, at the November 15, 2005 meeting, Cahill asked very specific, detailed questions about who said what, when, and how; Bock requested Cahill to put the questions in writing. (Tr. 997). Cahill never put questions in writing following the November 15, 2005 meeting. (Tr. 999).

Additionally, at the meeting, Bock asked Cahill, "What can you tell me that would convince me that we somehow took inappropriate action?" (Tr. 998). Cahill had no answer in response to the question. (Tr. 999).

Furthermore, at the November 15, 2005 meeting, Bock explained to Cahill that with regard to Bishop's personnel file, it was being collected and it was a busy part of the year, so it was taking time. (Tr. 995). Cahill, an experienced newspaper industry veteran, knew that the holiday period from Thanksgiving to New Year's Day is, historically, the busiest time of the year for *Hawaii Tribune-Herald*. (Tr. 783-85).

No accord was reached at the JCAC meeting on November 15, 2005.

G. *HAWAII TRIBUNE-HERALD* SENDS THE GUILD HUNTER BISHOP'S PERSONNEL FILE.

On January 26, 2006, *Hawaii Tribune-Herald* mailed the Guild, via certified U.S. Mail, return receipt requested, Bishop's personnel file. (Tr. 707-08). The Guild failed to claim this package. The package went unclaimed and was returned to *Hawaii Tribune-Herald* on March 3, 2006. (Tr. 708). The personnel file was ultimately received by the Guild in a second mailing. (Tr. 783).

On January 14, 2006, the Guild demanded arbitration of Bishop's suspension and discharge stating "the company discharged Hunter Bishop without just and sufficient cause in violation of sections 4 and 6 of the collective bargaining agreement between the company and the Guild…" (R. Ex. 93).

H. *HAWAII TRIBUNE-HERALD* ACQUIRES ADDITIONAL EVIDENCE TO SUPPORT BISHOP'S DISCHARGE.

On February 28, 2006, *Hawaii Tribune-Herald* sent Bishop a letter explaining that it had discovered additional misconduct, through after-acquired evidence, on his part, to warrant his termination (G.C. Ex. 5). *Hawaii Tribune-Herald* explained that Bishop had failed to meet a productivity standard for which he had previously been disciplined. (*Id*). In the letter, *Hawaii Tribune-Herald*, through Bock, stated, "If I had known of your continued poor story production

at the time that I communicated to you your discharge, your poor story productivity would have been an additional and/or independent reason for your discharge." (Tr. 1023-24; G.C. Ex. 5). Additionally, the letter stated, in relevant part:

> After your discharge, you participated in a public discussion of your disciplinary records/discharge at a forum held at the University of Hawaii-Hilo. During that forum, you made several public, disparaging/defamatory, disloyal statements about the product produced everyday by *Hawaii Tribune-Herald*.
>
> We believe this also was misconduct on your part. In addition, these public comments you have made about *Hawaii Tribune-Herald* indicate your intention to sever all possibility of ever again having a good, positive working relationship with the management of *Hawaii Tribune-Herald*. While *Hawaii Tribune-Herald* certainly believes that it had, on October 27, 2005, just and sufficient cause to discharge you, this additional misconduct on your part is also evidence to support your discharge.

(G.C. Ex. 5). The Guild did not contest *Hawaii Tribune-Herald*'s February 28, 2006 letter to Bishop by filing a grievance or unfair labor practice charge; the February 28, 2006 letter to Bishop was not alleged as unlawful in the Consolidated Complaint. (G.C. Ex. 1(zz)).

I. DAVE SMITH SECRETLY RECORDS EDITOR DAVID BOCK.

On March 3, 2006, Editor Bock and Assistant Editor Richard Palmer met with reporters, in Bock's office, to discuss their productivity. (Tr. 1024). Bock and Palmer met with each reporter individually. (*Id*). Bock and Palmer first met with Jason Armstrong. (*Id*). Armstrong requested a witness, which was denied as the meeting was not investigatory. (Tr. 1024-25). In spite of this notice, Armstrong asked Dave Smith to be a witness. (*Id*). Smith attempted to be in the meeting and Bock told Smith that Armstrong was not entitled to a witness. (*Id*). The meeting continued with Armstrong, Palmer, and Bock.[3]

Meanwhile, Smith decided to secretly tape his meeting with Bock. Smith testified:

Q. And why did you decide to [secretly record your meeting with Bock]?

[3] The Guild initially filed an unfair labor practice charge (37-CA-7082) over a purported *Weingarten* violation; that charge was later withdrawn. (ALJ Ex. 2, internal Ex. 1-F).

A. Because I felt like I had been – I was about to be illegally refused witness, and I wanted an accurate representation of what was going to occur at the meeting.

(Tr. 467-68; 1033-34).

Smith obtained a digital voice recorder from employee Peter Sur. (Tr. 467, 573-74). Sur demonstrated to Smith how to operate the recorder. (Tr. 574). Employee William Ing and Chris Loos saw what Smith intended to do and gave him suggestions to hide the recorder. (Tr. 612, 686). Employee Karen Welsh witnessed the spectacle. (Tr. 127).

Thereafter, Smith met with Bock and Palmer, in Bock's office. (Tr. 488-89). Prior to entering Bock's office, Smith asked for a *Weingarten* representative, which was denied.[4] (Tr. 488). By Smith's own accord, Bock informed him that he was receiving a verbal warning, rather than a written warning regarding Smith's productivity. (Tr. 490-91). At no time did the Guild file a grievance contesting Smith's verbal warning. (Tr. 542-43).

J. KAREN WELSH COMES FORWARD TO INFORM DAVID BOCK OF THE SECRET TAPE RECORDING.

On or about March 6, 2006, employee Karen Welsh approached Editor Bock, in the morning, and informed him that she believed he (Bock) had been secretly recorded by Smith on March 3, 2006. (Tr. 1027). When asked why she reported this to Bock, Welsh stated:

> …Well, I went home on Friday. I was completely disgusted with what I had witnessed. I was ashamed for my fellow employees. I was feeling like I was involved in junior—not that I was involved – but that I was witnessing junior high antics. And I just had this complete disbelief of what was going on in the newsroom.
>
> ****
>
> Q. Why were you disgusted?
> A. ***Because I knew it was wrong***.

[4] The Guild initially filed an unfair labor practice charge (37-CA-7081) alleging a *Weingarten* violation; the charge was later withdrawn. (ALJ Ex. 2, (1-E)).

(Tr. 126-27)(emphasis added).

Welsh conveyed to Bock the events concerning Smith's surreptitious recording of his conversation with Bock and Palmer. (Tr. 127). Bock was shocked. (Tr. 1027). Welsh revised and signed a statement reflecting what she witnessed. (Tr. 128, 143; R. Ex. 353).

K. ON MARCH 9, 2006, *HAWAII TRIBUNE-HERALD* CONDUCTS AN INVESTIGATION BY INTERVIEWING EMPLOYEES.

On March 9, 2006, Bock conducted an investigation of Smith's secret tape recording. (Tr. 1029). Associate Editor Palmer attended each meeting. (Tr. 1224, 1230, 1235, 1238).

1. Hawaii Tribune-Herald *Meets with Peter Sur.*

Bock met with Sur, first. (Tr. 1029). Bock informed Sur that the point of the meeting was "to talk to you about a very serious incident that occurred in the newsroom on the 3rd, and I want to ask you some questions about it." (Tr. 1029). Bock asked Sur if Sur was aware that Bock had been secretly tape recorded on March 3, 2006? (Tr. 1029). Sur replied, "Yes." (*Id*). Sur stated that Smith knew that he (Smith) was going to be denied a witness at his meeting and that Smith wanted to record the meeting as a result. (Tr. 1030). Bock asked Sur whose idea it was to secretly record the conversation? (Tr. 1030). Sur replied, "It was my idea." (*Id*). Palmer stated, "I'm blown away." (*Id*).

This admission was stunning because to that point, Bock believed Sur was only a witness to what happened, and not a participant. (*Id*).

At that point, Bock stopped the meeting and asked Sur if he would like a witness; Sur said yes. (*Id*). Sur selected Makanani Kaaua[5] as his witness. (*Id*).

[5] The General Counsel did not call Ms. Kaaua as a witness to the hearing to corroborate or rebut anything.

Sur confirmed that secretly recording Bock was his idea. (Tr. 1031). Sur explained that he provided the recorder because Smith was worried he would be denied a witness at the meeting. (Tr. 1031).

Bock told Sur that the secret tape recording was "the worst act of disloyalty that I've ever experienced, and distrust I'd ever experienced, not just there, but anywhere in my professional career." (*Id*). Sur stated, "Gosh this was probably a foolish idea. What I did was stupid." (*Id*).

Sur also stated that he showed Smith how to operate the recorder. (*Id*). When asked if he thought a secret recording had been made, Sur stated yes. (Tr. 1031-32). Bock asked Sur if he knew what Smith was planning to do with the recording; Sur stated that he thought Smith planned to transcribe the recording. (Tr. 1032).

At that point Sur apologized for his actions. (*Id*). Sur was suspended indefinitely without pay due to the serious nature of the matter. (*Id*). Sur asked if he was going to be fired; Bock said, "I hope not. You've been really contrite, you've apologized." (*Id*). Sur also stated that he would accept whatever punishment *Hawaii Tribune-Herald* deemed appropriate. (Tr. 593, 1032).

2. Hawaii Tribune-Herald *Meets with Dave Smith.*

At approximately 4 p.m. on March 9, 2006, Bock and Palmer met with Dave Smith in Bock's office. (Tr. 1033). Bock opened the meeting by stating, "Dave, my understanding is that you secretly recorded the meeting that took place on Friday [March 3, 2006] in which we talked about your story productivity." (*Id*). Smith admitted to secretly recording the meeting. (*Id*). Smith was "defiant," in his answer. (*Id*). Smith attempted to explain his actions by stating, "Well, you were going to deny me a witness, and I didn't want to meet without a witness. So I thought it would be best to make a recording." (Tr. 1033-34). Smith contradicted Sur and said that the idea to secretly record Bock was his (Smith's) idea. (Tr. 498-99).

Bock explained to Smith that surreptitious recording was improper. (Tr. 1034). Bock stated that the recording was "the worst act of disloyalty I've experienced in the newsroom." (*Id*). Bock asked Smith whose recorder it was and Smith refused to tell him. (*Id*). Bock gave Smith a directive to answer the question; Smith asked for a witness. (*Id*). Marie Ella joined the meeting as Smith's witness. (*Id*).

Smith admitted that the recorder was Sur's. (Tr. 1035). When asked where, presently, was the recorder, Smith stated, "I don't really know." (*Id*). This was false; Smith knew that the recorder was at his house. (Tr. 501**)**. Smith came around to admitting that the recorder "might be at home." (Tr. 1035).

In the meeting Bock stated that "it was just awful (to secretly record in the workplace) and that it was wrong and that we would never do it and that would he do something like that in the future? Does he understand that it's wrong?" (Tr. 1036). Smith, in response, stated, "I haven't heard either way whether it's wrong or not." (*Id*).

Bock made it extraordinarily clear to Smith that the expectations of *Hawaii Tribune-Herald*, were that Smith could not secretly record in the workplace, should not secretly record in the workplace, and that he would not secretly record again. (Tr. 1036). Smith refused to agree with Bock regarding the propriety of secret recording in the workplace. (*Id*). Smith was indefinitely suspended at the conclusion of the meeting. (Tr. 1036-37).

3. Hawaii Tribune-Herald *Meets with Chris Loos.*

On March 9, 2006, following Bock and Palmer's meeting with Smith, *Hawaii Tribune-Herald* interviewed employee Chris Loos. (Tr. 1038). Loos admitted that she was aware that Smith secretly recorded Bock, but told Bock she had no involvement in Smith's action. (*Id*). Loos was not disciplined. (Tr. 1044).

4. Hawaii Tribune-Herald *Meets with William Ing.*

Bock and Palmer next met with photographer William Ing. (Tr. 1042). Ing initially said, "I didn't really have any involvement, my back was turned," but came clean and admitted that he knew of Smith's intentions to secretly tape record the March 3, 2006 meeting with Bock, and admitted that he (Ing) suggested that Smith "conceal [the recorder] well." (Tr. 1043). No disciplinary action was taken against Ing. (Tr. 1044).

L. PETER SUR IS REINSTATED.

On March 10, 2006, Bock telephoned Sur and informed him (Sur) could return to work on March 11, 2006. (Tr. 1045). Also in the phone call, Bock obtained Sur's permission to obtain custody of the digital recorder from Smith. (Tr. 1044). When Sur returned to work, on the 11th, Bock explained to Sur that his suspension was over so quickly because he was honest and contrite during the investigation, because Sur had a clean disciplinary record, and because of the great relationship Sur had with *Hawaii Tribune-Herald*. (Tr. 1045).

On March 27, 2006, the Guild filed a grievance regarding Sur's suspension. (R.Ex. 154). On March 31, 2006, *Hawaii Tribune-Herald* denied the grievance, in writing. (R.Ex. 168).

M. DAVE SMITH IS INSUBORDINATE AND UNREPENTANT.

1. Hawaii Tribune-Herald *Attempts to Meet with Smith; Smith Refuses to Meet.*

On March 13, 2006, Bock telephoned Smith at home and on his cell phone. (Tr. 1048). Bock could not reach Smith and left him messages instructing him to call Bock. (*Id*). In both messages, Bock informed Smith that Peter Sur had authorized Bock to obtain the recorder and Smith needed to return it by 5:00 p.m. on the 13th, to Bock. (I*d*).

Smith called Bock later that day and told Bock that the Guild possessed the voice recorder. (Tr. 1049). Smith failed to show up at *Hawaii Tribune-Herald* on the 13th. (Tr. 1049).

On March 13, 2006, Bock drafted a letter to Smith that stated, in relevant part:

> This is a follow-up to the telephone messages (and subsequent conversation) I left for you on 3/13/06, in which I gave you a direct order to give me the audio recorder you used to surreptitiously record me. As you know, that incident of misconduct led to your indefinite unpaid suspension.
>
> I informed you that Peter Sur had authorized me to take possession of the voice recorder, which is his property. When you called me later in the day, you stated that you had turned it over to the union and/or Wayne Cahill. You did this without authorization.
>
> This is a direct order to retrieve the recorder, with the original recording intact, from the union and immediately return it to me. If you refuse, I will consider it another act of disloyalty and insubordination.
>
> Please report to my office at 5 p.m. on Friday, March 17. I would like to have meeting [sic] with you at that time.

(G. Ex. 12). The letter was mailed on March 14, 2006 via Express Mail. (Tr. 1050). Additionally, Bock called Smith and left a message on his phone informing Smith that Bock was sending him a letter and that Bock wanted to meet with Smith on the 17th. (Tr. 1050-51). Smith failed to show up for the meeting on the 17th. (Tr. 1051).

Sometime after 5 p.m. on March 17, 2006, in his (Bock's) door slot, Bock found a facsimile letter, from the Guild grieving Smith's suspension. (Tr. 1051; G.C. Ex. 33). On March 22, 2006, Bock responded and denied the grievance. (Tr. 1053; G.C Ex. 29).

On March 26, 2006, Smith drafted an e-mail to Guild Administrative Officer Cahill stating, in relevant part:

> …I was wondering how to handle the matter of the company's request that I retrieve the voice recorder. In his first letter to me Bock said Peter had authorized him to "take possession" of it; in his second letter which came last week he said that Peter had authorized him to direct me to retrieve it.

> As you know, I would rather not give Bock valid reason to find me insubordinate. I was wondering if I could say that since Bock claims Peter authorized him to take possession, it is now up to Bock to recover it and any authority Peter may have placed in me by giving me the recorder was no longer valid. Another alternative, of course, would be for me to officially ask you for the recorder as you suggested might be a possibility.
>
> ***
>
> As for the missed meeting at 5 p.m. on March 17, my position is that since I did not receive notice of it in the mail until 3:08 p.m. that day, there was insufficient time to arrange a meeting involving a union rep. Has it also been established that he was not there at 5 p.m. (I realized he was not there at 4:50 but is it clear what time he later returned)? Maybe the company will provide a copy of the surveillance camera which should have a time-date stamp. That's only partly a joke because maybe we could subpoena the tape, if it still exists, when they make that insubordination charge.)
>
> During Monday's meeting with Bock I intend to maintain that I believed I did nothing wrong on March 3 and believe so even more strongly today…

(R. Ex. 359)(produced pursuant to subpoena of *Hawaii Tribune-Herald*).

2. A Meeting Finally Occurs on March 27, 2006.

On March 27, 2006 at 4 p.m., at the Hilo Hawaiian Hotel, Bock, Crawford, Smith and Cahill met to complete the investigation of Smith's misconduct. (Tr. 1054-55). Bock asked Smith, if during the time he had been suspended – March 9 through 27 – Smith thought was wrong to secretly record Bock on March 3, 2006. (Tr. 1057). Smith stated "no." (Tr. 1057).

Bock asked Smith if he (Smith) would consider secretly recording Bock again. (*Id*). Smith stated that he hadn't thought about whether or not he would do it again and since he had not "been told it's improper," or "wrong," Smith could not say no. (*Id*). Smith did acknowledge awareness of a memorandum sent by Ted Dixon making it clear that secret tape recording was prohibited at *Hawaii Tribune-Herald*. (Tr. 1057; G.C. Ex. 16).

Bock stated, to Smith:

> … I told you that it was wrong the day I interviewed you about it. I told you it was improper. I told you I would never do something like that to you. I told you we wouldn't tolerate that in the workplace. We would never condone secretly recording a source. And

> so in light of all that – and I also have told you in writing, by the way. In light of all that, would you consider doing it again?

(Tr. 1057-58). Smith never responded to the question and would not commit to not secretly recording in the future. (Tr. 1058).

Bock also asked Smith if he (Smith) had the recorder with him. (Tr. 1059). Smith said that he did not and that he had given it to the Guild. (*Id*). Cahill interrupted and stated that *Hawaii Tribune-Herald* would not be getting the recorder because Cahill was "going to keep it for evidence of wrongdoing, to be used later." (Tr. 1060).

Bock also asked Smith if, in his (Smith's) employment at *Hawaii Tribune-Herald* had he (Smith) ever recorded a manager. (Tr. 1061). Smith said he had not. (*Id*). Finally, Bock asked Smith why he (Smith) did not let him (Bock) know whether he (Smith) would be attending the meeting on the 27th. (Tr. 1062). In response Smith said that Bock's letter didn't specify that he (Smith) had to respond directly to Bock. (Tr. 1062). Bock pointed out, in the letter, exactly where that expectation was placed on Smith. (Tr. 1062; G.C. Ex. 13). At that point, Cahill offered Bock a letter. (Tr. 1062; G.C. Ex. 34). It was approximately 4:24 p.m. (G.C. Ex. 34).

Bock and Crawford took a short break and returned at about 4:30 p.m. (Tr. 1062-63). Upon returning from the break, Bock asked Smith if Bock's understanding was correct that Smith secretly recorded Bock because Smith did not want to meet without a witness, Bock wanted to meet with him, and Smith knew that Bock was going to deny Smith a witness. (Tr. 1063). Smith confirmed this by saying "yes." (*Id*).

3. The Guild Refuses to Cooperate in the Investigation of Smith's Misconduct.

On March 31, 2006, Bock wrote Cahill a letter stating, in relevant part:

> With this letter, *Hawaii Tribune-Herald* is demanding that you return to us Peter Sur's voice recorder. Peter Sur has authorized us to obtain possession of it. You have no

> authority to be in possession of it. Dave Smith has admitted to us that he turned this recorder over to Hunter Bishop without having obtained Peter Sur's permission. Peter Sur, in an effort to cooperate with us in our investigation, has authorized *Hawaii Tribune-Herald* to have possession of the recorder. You have no legitimacy to have it.
>
> As we have told you and Mr. Smith before, Mr. Smith is on suspension without pay for engaging in serious misconduct, namely, surreptitiously recording a supervisor in the workplace. Mr. Smith is not on suspension because he has violated any law. It is just plain common sense that it is misconduct to surreptitiously tape your supervisor in the workplace, especially in the circumstances of this particular situation. *Hawaii Tribune-Herald* rejects the notion that an employee can only be disciplined for violating written policies. You of all people should know that this is an invalid position to take in light of two recent arbitration rulings upholding discipline given to an employee who had failed to meet our productivity standard. The union, to no avail, argued to that arbitrator that the productivity standard was unwritten. …

(G.C. Ex. 30).

4. Hawaii Tribune-Herald *Arranges a Meeting with Smith; Smith and the Guild Conspire.*

On April 5, 2006, Cahill sent a letter to Bock stating that "Peter Sur's digital voice recorder is in the Guild's custody and will remain so. The recorder is evidence of wrongdoing on the part of Hawaii Tribune-Herald and will be presented at the appropriate time(s). We will not release it to you." (G.C. Ex. 31).

On April 6, 2006, Bock sent Smith a letter stating, in relevant part:

> With this letter, I am directing you to meet with me at 5:00 p.m. on Tuesday, April 11, 2006 at the front door of the newspaper. We have concluded our investigation, and I want to meet with you to inform you of the discipline we have decided to impose. This will not be an investigatory meeting. You will not be entitled to a Weingarten representative.
>
> Please call me at work on Monday, April 10, 2006 to confirm your attendance at 5:00 p.m. on Tuesday, April 11, 2006.
>
> I will appreciate your cooperation in this matter.

(G.C. Ex. 14).

On April 8, 2006, Guild representative Hunter Bishop sent an email to Cahill stating, in relevant part:

> Dave got a letter Saturday from Bock ordering Smith to meet him Tuesday at the front door of the Tribune-Herald. Bock said he's concluded his investigation and that it's not a disciplinary meeting and Smith is not allowed to bring a union representative. It's clear he's being fired and that Bock will just give Smith his termination letter and hopefully his severance and box of stuff from his desk. I suggest we either blow it off and say Smith won't meet under those conditions, just making Bock mail everything like he did for me, ***or we make a big thing of it and send a lot of people with Smith, notify the media, picket, or whatever. Could be fun. Smith's up for it***. Let's talk about it Monday a.m. or asap. I'll fax you a copy of the letter as soon as I can.

(R. Ex. 362)(emphasis added)(produced pursuant to subpoena of *Hawaii Tribune-Herald*).

On April 10, 2006 Cahill sent Bock a letter stating, in relevant part:

> Dave Smith has asked me as his union representative to respond to your letter dated April 6, 2006. Mr. Smith will meet with you as you direct on Tuesday, April 11, 2006 at 5:00 PM at the front door of the Hawaii Tribune-Herald. By this letter he respectfully requests union representation for the meeting.
>
> We wish to remind you that the Hawaii Tribune-Herald and the Hawaii Newspaper Guild are parties to a Collective Bargaining Agreement. Section 1(A) of the Agreement provides: "the employer recognizes the Guild as the sole and exclusive collective bargaining agent for all employees covered by this agreement." …

(G. C. Ex. 35).

On April 11, 2006, Bock sent Cahill a letter, stating, in relevant part:

> My letter requested that Dave Smith, my employee, contact me directly. He has an obligation to do so. His failure to contact me as directed is an act of insubordination.
>
> We certainly understand that the union represents Mr. Smith and other *Hawaii Tribune-Herald* employees; however, that representation does not relieve Mr. Smith of his obligation to meet with his supervisors alone under various circumstances. There are also various circumstances under which Mr. Smith would be allowed Weingarten representation in a meeting with his supervisors. The 5:00 p.m. meeting on April 11, 2006 is not one of the situations. …

(G.C. Ex. 36).

5. Hawaii Tribune-Herald *and Smith Meet on April 11, 2006; Smith Receives an Opportunity to Return to Work.*

On April 11, 2006 at 5:00 p.m., Smith arrived at *Hawaii Tribune-Herald* to meet, per Bock's directive. (Tr. 1066-67). Smith tried to make a production of the meeting, showing up with an entourage of approximately eight people. (Tr. 1067). Smith brought his wife, who was using a video camera to record the events; there was a news reporter present; Hunter Bishop was present; and a few other people were chanting something. (*Id*).

Bock said to Smith, "Dave, why don't you come on in so we can have our meeting." (*Id*). Smith refused stating, "no, we're going to meet right here. You told me to meet at the front door." (*Id*). Bock informed Smith that he was correct, however the meeting was to occur in Bock's office. (*Id*). Smith refused, again. (*Id*). Bock gave Smith a direct order to come in and meet inside the building. (Tr. 1068). Smith stated that he would not meet without a witness. (*Id*). Finally Bock stated, "Dave, I'm giving a directive. I'm going to have to consider it insubordination if you don't meet with me now in my office. And we've explained a witness would not be allowed in this case." (Tr. 1068). Smith relented and entered the building. (Tr. 1069). At Smith's request, Bock provided Smith a writing pad. (*Id*).

Smith met with Bock and Palmer in Bock's office. Bock presented Smith with a three-page letter dated April 11, 2006, specifically chronicling Smith's misconduct during the investigation; explaining that Smith's secret taping of March 3, 2006 was insubordination, as well because it amounted to "bringing in a witness in violation of my instructions" to meet with Bock alone; and warning Smith that future instances of surreptitious recording in the workplace would result in discharge. (Tr. 1069; G.C. Ex. 3).

Bock repeated the last line of the letter to Smith and stated "Dave, give it some serious thought. I'd like to get you back to work … I need Dave Smith's stories in the paper … you've been suspended for a long time now. Read the letter and give it some serious consideration and come back to work and be a productive member of our team." (Tr. 1069-70). Smith looked at the letter and said that he did not agree with it. (Tr. 1070).

The letter contained an acknowledgement form that stated, in relevant part:

> I, Dave Smith, acknowledge that upon returning to work to my reporter position at *Hawaii Tribune-Herald*, surreptitiously recording in the workplace will continue to be considered serious misconduct by *Hawaii Tribune-Herald* management, and, if I engage in surreptitious recording again the workplace, such conduct will subject me to discharge.

(G.C. Ex. 3).

6. Smith Refuses to Return to Work; He Voluntarily Terminated his Employment.

On or about April 18, 2006, Cahill called Bock seeking clarification about the April 11, 2006 letter. (Tr. 1071). Cahill asked if the letter was correct, stating that Smith could return on April 18, 2006, but he would have until April 21, 2006, to sign the acknowledgement form. (*Id*). Bock indicated there was no error and that *Hawaii Tribune-Herald* wanted Smith to get back to work and would take him back to work so long as he signed it by the 21st of April. (Tr. 1071-72).

Also on April 18, 2006, Bock sent Cahill a letter stating, in relevant part:

> This letter is sent to follow-up to our meeting yesterday concerning Dave Smith. During that meeting, you alleged that asking Dave to sign the acknowledgement form was direct dealing[6] with a member. That is just not true. We are not negotiating with Dave. This is not direct dealing. Rather, because Dave had been defiant in his refusal to acknowledge that *Hawaii Tribune-Herald* would not accept surreptitious recording in the workplace, it was important going forward that Dave Smith acknowledge our expectations and be forewarned.

[6] The Guild initially filed an unfair labor practice charge (37-CA-7113) alleging direct dealing; that charge was withdrawn. (ALJ Ex. 2, internal Exhibit l-M).

> Dave Smith is no way denied representation. In the event that further discipline is imposed, the union will have the right to represent him by filing a grievance and pursuant to arbitration, should you deem it necessary.

(G.C. Ex. 37).

Smith never returned to work. On April 26, 2006, Bock sent Smith a letter, stating, in relevant part:

> Since giving you my letter dated April 11, 2006, you have made no effort to contact me pursuant to that letter. Your active employment is terminated immediately. Enclosed is a check that includes your accrued vacation and severance pay. Your personal effects will collected from your desk and shipped to you.

(G.C. Ex. 15).

N. *HAWAII TRIBUNE-HERALD* DIRECTS EMPLOYEES TO REMOVE A BUTTON THAT BORE NO UNION INSIGNIA, WHOSE PURPOSE WAS NOT COMMUNICATED TO *HAWAII TRIBUNE-HERALD*, AND WHICH CONSTITUTED SELF-HELP.

On November 1, 2005, Publisher Dixon distributed a letter to *Hawaii Tribune-Herald* employees stating, in relevant part:

> Yesterday, I noticed some of you were wearing a button with Hunter Bishop's photograph on it and the caption "Bring back Hunter." Please remove these buttons when you are on working time. Working time includes not only working time on our premises, but also time spent away from the Hawaii Tribune-Herald, on job assignments for Hawaii Tribune-Herald, i.e. covering events as a journalist, and/or meeting with advertisers.
>
> When you are out acting as an ambassador of Hawaii Tribune-Herald, the image you project to the public should be neutral, non-confrontational, and reflect the integrity of our newspaper. The button is distracting from your job, potentially and/or actually disrupts your work, and the button is not endorsed by the company.
>
> Thank you for your cooperation in this matter. Should you have any questions, please feel free to contact me.

(G.C. Ex. 9).

The button in question was a button approximately two and a half inches around with a square image of Hunter Bishop's face; below the picture were the words "Bring Hunter Back."

(G.C. Ex. 8). The button bore no insignia of any kind. (*Id*). The button made no reference to *Hawaii Tribune-Herald. Hawaii Tribune-Herald* was never informed by anyone as to the purpose of the button, who created it, or why it was worn. (Tr. 1085).

It is undisputed that *Hawaii Tribune-Herald* received no notice of any kind from the Guild regarding the button. (Tr. 1085). The only claim the Guild made regarding the button was in an April 5, 2006 grievance entitled "Guild Grievance/ Union Insignia." (R. Ex. 172(rejected)). In that letter, signed by Cahill, the union claimed that the button was "a union button." (*Id*).

O. *HAWAII TRIBUNE-HERALD* DIRECTS EMPLOYEES TO NOT WEAR A RED ARMBAND.

On March 13, 2006, Publisher Dixon distributed to employees a letter to *Hawaii Tribune-Herald* employees stating, in relevant part:

> Today, I have been informed some of you are wearing a red armband. Please remove these armbands when you are on working time. Working time includes not only working time on our premises, but also time spent away from the *Hawaii Tribune-Herald* facility, on job assignments for *Hawaii Tribune-Herald*, i.e. covering events as a journalist, and/or meeting with advertisers.
>
> When you are out acting as an ambassador of *Hawaii Tribune-Herald*, the image you project to the public should be neutral, non-confrontational, and reflect the integrity of our newspaper. The armband is distracting from your job, potentially and/or actually disrupts your work, and the armband is not endorsed by the company.
>
> Thank you for your cooperation in this matter. Should you have any questions, please feel free to contact me.

(G.C. Ex. 10).

At no time did *Hawaii Tribune-Herald* receive any communication or notification from the Guild concerning the red armband. (Tr. 1086). Advertising Director Sledge testified that she noticed the armbands at a meeting in the morning of March 16, 2006. (Tr. 1147-48). No one informed her – including advertising employee Marie Ella – of the armband's purpose. (Tr.

1148). The armbands were not identical, they were described as "kind of a rag tied around the arm." (*Id*). The armbands had no writing on them to signify their purpose; it was just a plain red armband. (Tr. 1149). There was no union insignia on the armband. There was no reference to *Hawaii Tribune-Herald*.

P. THE GUILD FILES UNFAIR LABOR PRACTICE CHARGES, THE GENERAL COUNSEL ISSUES A COMPLAINT, AND THERE IS A HEARING.

On March 30, 2007, the Regional Director of NLRB Region 19 issued a Consolidated Complaint in this case. Each of the allegations were based on purported violations of the CBA between *Hawaii Tribune-Herald* and the Guild. As the arbitration process established in the CBA is currently broken, the General Counsel elected to prosecute allegations that would have otherwise been deferred to arbitration. The General Counsel's[7] decision to prosecute contract-based claims was the reason the parties had a hearing before ALJ John J. McCarrick in the historic federal building on Wianuenue Avenue in Hilo, Hawaii from October 23, 2007 through October 31, 2007. The facts described above were adduced at the hearing. ALJ McCarrick, in granting a Motion in Limine filed by the General Counsel, foreclosed[8] *Hawaii Tribune-Herald* from presenting evidence concerning the Guild's 8(b)(3) bad faith conduct concerning the arbitration deferral process. (R.Exs. 95, 110, 118, 121, 127, 134, 138, 181, 192, 206, 208, 212, 213, 215, 235, 238, 242, 243, 244, 247-50, 251, 255, 363-70 (rejected)). The Guild "gamed the system" by refusing to arbitrate basic contract claims.

[7] The term "General Counsel" is used herein to specifically reference Counsel to the General Counsel.

[8] Granting the General Counsel's Motion in Limine was error for the reason stated in *Hawaii Tribune-Herald*'s Opposition for Motion in Limine. (ALJ Ex. 3).

III. ISSUES INVOLVED AND TO BE ARGUED

A. Whether *Hawaii Tribune-Herald* had a lawful Access Policy?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 5-17.

B. Whether *Hawaii Tribune-Herald* met with and disciplined Koryn Nako for legitimate, non-discriminatory reasons when it issued her a written warning on October 26, 2005 for violating *Hawaii Tribune-Herald*'s Access Policy?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 18-50, 54, 56-57 .

C. Whether *Hawaii Tribune-Herald* disciplined and discharged Hunter Bishop for legitimate, non-discriminatory reasons when it suspended him on October 19, 2005, and later discharged him on October 26, 2005 for disrespectful, insubordinate conduct on October 18, 2005?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 51-84, 91-93, 98, 100-101.

D. Whether Hunter Bishop's post-discharge conduct ruined reinstatement as an appropriate remedy?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 85-90.

E. Whether *Hawaii Tribune-Herald* met its obligation to provide the reasonably necessary information requested by the Hawaii Newspaper Guild in a timely manner?
Primary exceptions on this issue are Respondents Exceptions 1-2, 102-140.

F. Whether *Hawaii Tribune-Herald* disciplined and discharged Dave Smith for legitimate, non-discriminatory reasons when it suspended him on March 9, 2006 for misconduct by way of secretly recording a conversation with a supervisor, and discharged him on April 26, 2006 for continued insubordination?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 141-165, 168-174, 188-212.

G. Whether *Hawaii Tribune-Herald* disciplined Peter Sur for legitimate, non-discriminatory reasons when it suspended him on March 9, 2006 for his role in Dave Smith's secret taping of a conversation with a supervisor on March 3, 2006?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 141, 143, 147, 151, 162-167, 186-187.

H. Whether *Hawaii Tribune-Herald* met with Dave Smith, Peter Sur, Chris Loos and Will Ing, on March 9, 2006 for legitimate, non-discriminatory reasons in investigation an allegation of misconduct on March 3, 2006?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 147-149, 151, 161-185, 192, 195.

I. Whether *Hawaii Tribune-Herald* lawfully instituted a policy prohibiting secret tape recording in the workplace?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 230.

J. Whether *Hawaii Tribune Herald* lawfully ordered employees to remove buttons that bore no union insignia and only stated "Bring Hunter Back" on November 1, 2005?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 213-221.

K. Whether *Hawaii Tribune Herald* lawfully ordered employees to remove red armbands that bore no union insignia on March 15, 2006?
Primary exceptions on this issue are 1-2, 216-218, 222-229.

L. Whether the ALJ properly credited witnesses in his recommended Order dated March 6, 2008?
Primary exceptions on this issue are Respondent's Exceptions 1-2, 94-96, 99.

M. Whether the ALJ's Decision and Recommended Order is based on substantial evidence and supported by the record, as a whole?
Primary exceptions on this issue are Exceptions 1-237.

IV. ARGUMENT

A. *HAWAII TRIBUNE-HERALD* IMPLEMENTED A VALID, NON-DISCRIMINATORY ACCESS POLICY.

The ALJ erred in finding that *Hawaii Tribune-Herald* discriminatorily applied its Access Policy against the Guild in violation of Section 8(a)(1) of the Act. (Dec. at 22: 23-25, 30-35; Dec. at 23: 8-9). This finding constituted reversible error.

1. Any Allegation or Finding Based on the Access Policy are Time-Barred by Section 10(b) of the Act.

The Guild filed charge No. 37-CA-7046 on January 26, 2006. (G.C. 1(w)), almost two years after Publisher Dixon's February and March 2004 letters. The access policy was implemented in July of 2003, clarified for the Guild in February of 2004, and reiterated to the employees, specifically, in March of 2004. This stale charge should have been dismissed.

Former-Publisher Wilson's July 17, 2003 memo regarding security gates (R. Ex. 347) laid out the need for security gates in order to make the building more secure and conducive to business. (R. Ex. 347). At Cahill's request, Publisher Dixon sent the Guild a February 17, 2004 a letter, indicating that the lobby was the only public area at *Hawaii Tribune-Herald*, and that all other areas were for employees only. (G.C. Ex. 32). A few weeks later, on March 3, 2004, Publisher Dixon circulated another memo detailing internal security procedures for employees to follow when non-employees entered the *Hawaii Tribune-Herald* facility. (R. Ex. 330). The Guild never grieved or filed ULPs over these security policies. (Tr. 843).

2. Hawaii Tribune-Herald *Can Maintain a Secure Facility.*

Hawaii Tribune-Herald can certainly enforce its private property rights. *See NLRB v. Babcox & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.3d. 975 (1956). There were no special circumstance that would have required a trespass by the Guild on to *Hawaii Tribune-Herald*'s property. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed. 2d. 79 (1992); *SCNO Barge Lines*, 287 NLRB 169, 170 (1987). As the D.C. Circuit opined: "Private property rights entitle an employer to direct the ability of union organizers to enter company property and solicit for the union. As long as important employee rights may be exercised through other means, equally important private property rights need not be sacrificed." *United Steelworkers of Am. v. NLRB*, 646 F.2d 617, 637-38 (D.C. Cir. 1981). In essence, the ALJ found that *Hawaii Tribune-Herald* could not maintain a secure workplace and that the Guild had superior rights to *Hawaii Tribune-Herald*'s private property. This conclusion was error.

3. The Guild Knew About the Policy.

The Guild honored the Access Policy from February 17, 2004 until October 18, 2005. In his findings of fact, the ALJ glossed over key points, omitting vital testimony establishing what

the parties knew and expected with regard to the Access Policy. Nakakura knew about the policy and that he needed management permission to enter the facility. (Tr. 415-16).[9] It is undisputed that Nakakura had no business to transact with the company. (Tr. 340). Cahill knew about the policy as well. (Tr. 844). Nako even admitted that she was aware of the policy. (Tr. 291-92). The ALJ ignored these unrebutted admissions.

When Nakakura arrived at *Hawaii Tribune-Herald*, ***Nakakura asked Nako if it was alright for him to enter through the employee entrance***. (Tr. 408). This was an admission. Nako's testimony corroborated this fact. (Tr. 212). Incredibly, the ALJ's Decision left out any mention of Nakakura's admission.

Further, the ALJ re-wrote the facts, concluding that Nako "assumed" she received permission from Supervisor Vierra to let in Nakakura. (Dec. at 5: 10-13). This "finding" constitutes improper speculation on the part of the ALJ, ***and was discredited by the fact that neither Nako or Nakakura stated that Supervisor Vierra authorized Nakakura to enter the building when later asked by Bock***. (Tr. 417, 1176-77). In fact Nako, herself, stated that she – alone – authorized Nakakura to enter *Hawaii Tribune-Herald*. (Tr. 411-12).

4. The Policy was Not Ambiguous.

The ALJ erred in finding that the Access Policy was ambiguous . (Dec. at 16: 20-21; Dec. at 17: 6-7; 33-34; Dec. at 21: 18-20; Dec. at 22: 22-23). The original 2003 memo from Wilson indicated that the entire facility was no longer open to the public; the security gates "will help control traffic throughout the building, making the building secure and conducive to business." (R. Ex. 347).

[9] It is irrelevant whether Dixon's February 17 2004 letter was distributed to all employees; the ALJ's finding to the contrary was error. (Dec. at 3: 45-46). What is relevant is that Cahill, Nakakura and Nako were aware.

Later, in 2004, Publisher Dixon explained – to the Guild – "the lobby area is set aside as a public area. Security gates are meant to restrict the public to that area. All other areas are for employees only. The only exceptions to that are for those who have pre-arranged business with the *Hawaii Tribune-Herald*." (G.C. Ex. 32). If the Guild wanted to conduct business with an employee on break, Dixon preferred that they meet outside, but could meet in the lobby, so as it did not disrupt work being done at *Hawaii Tribune-Herald*. (G.C. Ex. 32).

Dixon explained the same thing – to the employees – that the only public area was the lobby. (R. Ex. 330). Per section (2) of the Internal Security Procedures, outside entities (such as the Guild) needed to come in to the lobby, and call the employee per 1(c) of the Procedures, and meet in the lobby. (*Id*.) There was no ambiguity, and certainly no misunderstanding that the secure, employee entrance was not a public entryway of *Hawaii Tribune-Herald*.

Nako and Nakakura completely bypassed the security procedures. Nako snuck Nakakura in the back door. There is not even the slightest bit of evidence that they attempted to comply with the policy. Nako testified that she did not want Nakakura to come in through the lobby because she feared a disruption! (Tr. 299). She obviously knew about the policy, how it worked, and consciously violated it. How such a course of events gave rise to a finding of discrimination was unbelievable; had anyone else done this, they too would have been in violation of the policy. The unrebutted facts are that Nako admitted she had no need to have Nakakura enter the building; she testified she could have mailed the papers to Nakakura or she could have met Nakakura at the union's Hilo office. (Tr. 253, 299, 340; R. Ex. 7).

5. The Record Does Not Support the ALJ's Findings.

The record did not reflect that *Hawaii Tribune-Herald* employees regularly brought non-employees, including friends and family members into the newsroom through the employee

entrance at all times of day where supervisors were regularly present. (Dec. at 4: 44-47; Dec. at 17: 17-21, 34-35; Dec. at 21: 20-23; Dec. at 22: 31-32). The ALJ also assumed[10] that the offices of David Bock, Richard Palmer and William Crawford opened into the newsroom, that they had a clear view of what was happening there. (Dec. at 4: 47-48; Dec. at 5: 1-2).

The ALJ found that there was "ample evidence" that non-customer visitors, including friends, family and vendors were regularly allowed access with supervisor knowledge. (Dec. at 17: 19-21). There was no record evidence to support this. The only example of supervisory knowledge regarding an employee involved employee Marie Ella and her son, who was given permission to go to the employee breakroom and do his homework. (Tr. 1168-69). A single example does not constitute "ample evidence." Moreover, this example was more than just supervisory knowledge – it was knowledge ***and permission***!

The ALJ erred in his forced finding that that the requirement for prior management approval was applied only against the Guild; such was not the case. (Dec. at 22: 30-31). *Hawaii Tribune-Herald* did not permit access to any non-employees without prior management approval. (Tr. 1084-85). Ella asked for permission for her son to do schoolwork in the breakroom. (*Cf.* Dec. at 5: 1-2). This example actually supported the fact that employees asked for and received management approval to bring non-employees into the workplace. There was no evidence that supervisors knew that any non-supervisory employees admitted non-employees into the *Hawaii Tribune-Herald* facility without prior management approval. The testimony of Loos, Ing and other employees did not prove that management knew of the recounted tales of non-employee visits.

[10] Conveniently, there was no record evidence of whether Bock's office has windows that look out into the newsroom (there are none), whether Palmer's office looks out into the newsroom (it does not) and whether Crawford's office has windows that look out into the newsroom (it does not). The ALJ's "findings" were made of whole cloth.

The other examples cited by the ALJ and in the record were inapposite. Gary Hoff was a contracted cartoonist for the *Hawaii Tribune-Herald*. (Tr. 1079). The fact that a contractor entered the building cannot suggest an invalid or discriminatorily-applied access policy. Hoff had business to transact and entered with prior management permission. He was subject to the same policy as the union.

Similarly, the fact that cleaning crews, maintenance workers, or air-conditioning service contractors were allowed entry into the building was irrelevant – they too had contractual agreements. (Tr. 1084-85). The third parties had specific business to transact and entered with prior management permission. They were subject to the same policy as the union.

The ALJ further relied on examples of *Hawaii Tribune-Herald* ***management*** bringing in family as evidence of a lack of an enforced policy or discriminatory application of the Access Policy. (Dec. at 21: 22-23). This was unavailing. An employer can maintain rules and engage in the same conduct that would violate those rules if done by a non-management employee. *See NLRB v. United Steelworkers*, 357 U.S. 357 78 S.Ct. 1268, 2 L.Ed.2d 1383 (1958)(holding that an employer could maintain a no-solicitation rule against employees that the employer, itself, violated); *K-Mart Corp*., 336 NLRB 455, 468 (2001)(same); *St. Francis Hosp*., 263 NLRB 834, 835 (1982); *Beverly Enterprises-Hawaii, Inc*., 326 NLRB 335, 336 (1998)(same).

The Board noted in *Nutone, Inc. (Steelworkers)*, 112 NLRB 1153, 1154 (1955) that "management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself. Otherwise an employer can only enforce a rule he promulgates so long as he conducts himself according to the rule."

Clearly, Associate Editor Palmer's wife gaining access via the employee entrance is not persuasive. Palmer worked after normal business hours, when the front door would be locked.

(Tr. 666, 670). Even if one were to assume that Palmer worked during the day, or that a manager knew about someone's sister or spouse using the bathroom that was not a discriminatory application of the Access Policy. The apples to apples comparison would be management allowing (with knowledge) an Amway sales person to come through the employee entrance and transact business with employees in the breakroom. The record is devoid of any such evidence.

The Board recognized that discrimination must be based on "like circumstances," in *The Register-Guard*, 351 NLRB No. 70 (2007). In *The Register Guard*, the Board reiterated *Lechmere's* teaching that "an employer may exclude non-employee union agents from its property, except where the employer acts discriminatorily or where the union has no reasonable alternative means to communicate with the employees." 351 NLRB No. 70 at fn. 25 (citing *Lechmere Inc.*, 502 U.S. at 535, 538).

Furthermore, the Board, in *The Register-Guard*, agreed that permitting a small number of isolated "beneficent acts," as narrow exceptions to a no solicitation rule, did not establish discriminatory enforcement. (*See The Register-Guard* at fn. 23 citing *Hammary Mfg. Corp.*, 265 NLRB 57 (1982)). The same rationale applied to the Access Policy. In *The Register-Guard*, the Board adopted the standard explained by the Seventh Circuit in *Fleming Co. v. NLRB*, 349 F.3d 968 (7th Cir. 2003)(denying enforcement to 336 NLRB 192 (2001)), to determine what constituted discrimination) and *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995)(denying enforcement of 313 NLRB 1275 (1994)).[11] *Id* at 8. The Board stated:

> ***We find that the Seventh Circuit's analysis, rather than existing Board precedent, better reflects the principle that discrimination means the unequal treatment of equals***. Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other

[11] The Board said, "We therefore adopt the position of the court in *Fleming* and *Guardian* that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and we shall apply this view in the present and future cases." *The Register-Guard* at *10.

> words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status. See, e.g., *Fleming*, supra, 349 F.3d at 975 ("[C]ourts should look for disparate treatment of union postings before finding that an employer violated Sec. 8(a)(1)."); *Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996)(charging party must demonstrate that "the employer treated nonunion solicitations differently than union solicitations"). (emphasis added)[12]

(*Id* at 9). Blood relatives and the like are not equal to the Guild, and cannot form the basis for unequal treatment; at best, they might represent the "beneficent acts" the Board mentioned in *The Register-Guard*. There is no evidence to suggest that *Hawaii Tribune-Herald* enforced its access policy "along Section 7 lines." There was no evidence demonstrating that *Hawaii Tribune-Herald* permitted other outside organizations access to conduct business with *Hawaii Tribune-Herald* employees in the breakroom, or in any other non-public area. (Tr. 1075-1076). The ALJ's contrary finding constituted reversible error.

B. HUNTER BISHOP WAS SUSPENDED AND LATER DISCHARGED FOR CAUSE WITHIN THE MEANING OF SECTION 10(C) OF THE ACT FOR DISRESPECTFUL, INSUBORDINATE, AND DISRUPTIVE BEHAVIOR DIRECTED TOWARD HIS SUPERVISOR IN FRONT OF OTHER EMPLOYEES.

Section 10(c) of the Act states, in relevant part:

> No order of the Board shall require the reinstatement of an individual as an employee who has been suspended or discharged, for the payment to him with any backpay, if such an individual was suspended or discharged for cause.

Hawaii Tribune-Herald certainly had ***cause*** to suspend and discharge Hunter Bishop under the facts of this case. By letter dated October 27, 2005, Editor David Bock converted Mr. Bishop's indefinite unpaid suspension to discharge and stated:

> Specifically we are discharging you because of your misconduct on October 18, 2005. You were disrespectful of authority, insubordinate and disruptive of my efforts to have a

[12] It should be noted that ALJ McCarrick was the ALJ in *The Register-Guard*. His hostility at being overturned in *The Register Guard* was evident in the instant Decision. He mis-applied the standard and apparently has little respect for the Board's decision in *The Register-Guard*.

> conversation with one of our employees. You engaged in this conduct in the presence of other employees, which makes the situation even more egregious. As I have told you many times over the years, it is your behavior that gets you in trouble.
>
> We repeatedly used measured discipline in an effort to correct this behavior. Despite our repeated efforts, you have continued in this ongoing pattern of disrespect to management and insubordination. In view of all of the circumstances, and your entire disciplinary record with *Hawaii Tribune-Herald*, I've decided to discharge you.

(G.C. Ex. 2). Bock's letter clearly stated the reasons for Bishop's discharge. Bishop's discharge had nothing to do with either protected and/or union activity.[13] The General Counsel failed to prove that Bishop was suspended or discharged in violation of the Act. The General Counsel merely proved that Bishop was active in the union and held the position of Unit Chairperson. However, the fortuity of his Unit Chairperson position and activity on behalf of the union afforded him no protection for his misconduct on October 18, 2005.

1. Hunter Bishop Engaged in Serious Misconduct on October 18, 2005, Was Disrespectful of Supervisor Authority, Insubordinate, and Disruptive.

On October 18, 2005, Editor Bock, after escorting Nakakura from the building, went to the breakroom and asked to speak to Nako. Without objection, Nako followed Bock to his office. Nako did not ask Bock for union representation. Hunter Bishop, at that point, followed them and, in a loud voice on the open workplace floor said, "I'm going to be in that meeting," (Tr. 930-931) or "I need to be in that meeting." (Tr. 964, 1131). At that moment Advertising Director Alice Sledge was walking back toward her office but when she heard Bishop's loud voice, she turned around to observe. (Tr. 1131; R. Ex. 357). Bishop was angry and his face was red; his fists were clenched. (Tr. 965, 1138). According to Sledge, Bishop was "in his space,"

[13] Bock testified that he disciplined Bishop not because he tried to interject himself as Nako's witness, but because of the manner in which he treated his supervisor. (Tr. 978, 995, 1011, 1012).

referring to Editor Bock. Arlan Vierra, also present and witnessing these events, described Bishop as tense, red-faced and speaking in a loud voice. (Tr. 931; R. Ex. 356). Editor Bock "diffused the situation" by calmly informing Bishop that the matter did not concern him. (Tr. 964, 965, 1138). At this point, Advertising Director Sledge returned to her enclosed office on the other side of the building.[14] (Tr. 1139-1140).

The prudent thing to do at that point would have been for Bishop to go back to work. Instead, he insubordinately continued to follow Editor Bock across the room. There was yet a second confrontation instigated by Bishop.[15] Again Bishop, in a very loud voice, said, "I need to be in this meeting," and again Bock, in a normal tone of voice, told him it was none of his business and did not concern him. (Tr. 934). Again, Bishop spoke in a very loud voice while Editor Bock remained calm. (Tr. 934). The prudent thing to do would have been for Bishop to accept Editor Bock's response and to go back to work. Instead he insubordinately continued to follow Bock and Nako as they walked toward Bock's office. Bishop continued to follow Bock asking in a loud voice "if this was disciplinary." Bock, in a normal tone of voice, again told Bishop this did not concern him. (Tr. 936, 966).

Bishop confronted Bock a third time, his voice getting louder. (Tr. 936). Bock stopped, turned around and faced Bishop and said, "Hunter please calm down. This is not your concern. Do you really want to keep pushing?" (Tr. 936-937; 967). Bishop was red-faced and very

[14] Sledge's office is on the other side of a solid wall separating the newsroom and composing room from Advertising and Business departments. (Tr. 1130, 1140, 1158-63). The ALJ faulted her for not having the extrasensory hearing ability to hear through solid wall. (Dec. at 40-41). Thus, once she returned to her office, Sledge would not have heard the additional confrontations of Hunter Bishop.

[15] Tellingly, the ALJ described the exchanges between Bock and Bishop as "confrontations." (Dec. at 28: 36).

agitated. (Tr. 937). His jaw was clenched and he was standing stiff. He was angry. (Tr. 938, 968). Bishop did not back off. He insubordinately continued to follow Bock and Nako.

There was a final confrontation by Bishop. (Tr. 939-940). At this point Bishop yelled, he raised up his hands and said, "So you're not going to give me an answer?" (Tr. 9689). Bock, in a normal tone of voice, again told Bishop this did not concern him. All throughout Bishop's stalking of Editor Bock, other employees were present and working in the newsroom and composing areas. Employees Cliff Panis, Eileen Hussy, Meg Premo, Will Ing, and Leigh Critchlow were on duty and present where the confrontations occurred.

Bishop's tirade against Bock drew everyone's attention. Sledge, Vierra, and Premo all stopped what they were doing and watched it unfold.[16] Again Editor Bock said, "This does not concern you." (Tr. 939). At that point, as they all were very close to Bock's office, Nako turned to Hunter and said, "It's okay, Hunter. If I need you, I will come and get you."[17] (G.C. Ex. 6, Aff. Nako; Tr. 220, 312, 939-940).

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[16] Even witnesses for the General Counsel (Ing and Critchlow) admitted this confrontation was disruptive enough to make them stop working and observe what was going on. (Tr. 421, 423, 601-602, 635-636). Every witness who testified contradicted the ALJ's conclusion that Bishop's confrontation of Bock did not disrupt the workplace. (Dec. at 29: 34-36).

[17] At no time did Nako ask David Bock for a *Weingarten* representative. (G.C. Ex. 6; Tr. 326, 972). The ALJ was just wrong in his contrary finding. (Dec. at 29:45). There is no *Weingarten* issue. Nako told Hunter it was okay and that she would call him if she needed him. The ALJ erred in "straining at gnats" to try to justify Bishop's misconduct. (Dec. at 29: 44; 30: 8). No General Counsel witness rebutted this key fact. Furthermore, the individual must personally request a *Weingarten* representative; a union representative cannot assert the *Weingarten* right of an individual. *See Appalachian Power Co.*, 253 NLRB 931, 933-34 (1980) enfd. 660 F.2d 488 (4th Cir. 1981)(unpublished), cert. denied 454 U.S. 866, 102 S.Ct. 327, 70 L.Ed.2d 166 (1981) ("… the Board consistently has required that the involved employee initiate the request for representation. *See, e.g., Kohl's Food Co.*, 249 NLRB 75 (1980); *First Nat'l Supermarkets, Inc., d/b/a Pick-N-Pay Supermarkets, Inc.*, 247 NLRB No. 162 (1980), cited in *Airco Alloys, a Div. of Airco, Inc.*, 249 NLRB 524 (1980) (Chairman Fanning's concurrence); *Lennox Indus., Inc.,* 244 NLRB 607 (1971)*; Inland Container Corp.*, 240 NLRB 1298 (1979). Further, the Board has held that the employee's request for union representation must not only be personal, but ***also***

Employee Meg Premo had the best vantage point to witness Bishop's conduct as he got closer to Bock's office. Premo's desk in the newsroom was very close to Bock's office. The last of the misconduct described by Vierra occurred within one and a half to two feet from Premo's desk. (Tr. 894). Premo, like Vierra, testified that Bishop's confrontation started by the breakroom with Bishop speaking in a loud voice. His voice got louder and louder as he walked across the room. Bock's voice remained normal. (Tr. 894). In fact, Bock asked Bishop to lower his voice. (Tr. 892). With that request, Bishop just got louder. (Tr. 911).

In the final confrontation that occurred within two feet of her desk, Premo was in the best position to observe that confrontation. She had a full view of the confrontation.[18] (Tr. 895-896; R. Ex. 355). Bishop's fists were clenched. (Tr. 897). This was Premo's third day on the job and

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must be directed to the management official who alone knows why he wishes to communicate with the employee and is in a position to assess whether or not to grant the employee's request for representation.")(emphasis added)). The Guild filed this charge, Case No. 37-CA-7045, on January 26, 2006. (G.C. Ex. 1(s), Internal Ex. 2). On March 27, 2007, the Guild filed an amended 37-CA-7045, removing the *Weingarten* violation that was alleged in the original charge. (G.C. Ex. 1(u)). In *Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985), the Board stated. "We hold today that a dismissed charge may not be reinstated outside the six-month limitations period of Section 10(b) absent special circumstances ... further we find the standard must apply regardless of whether the charge was withdrawn ***or*** dismissed. We see no substantive distinction between a withdrawn and a dismissed charge. In either event, the charge has been disposed of and, in effect, ceasing to exist. Moreover, it seems to us that the dismissal of a charge by a government official well-versed in the intricacies of labor law creates the impression on members of the public that the charge has been disposed of even more conclusively than is the case when it is merely withdrawn." *see also District Lodge 64 v. NLRB*, 949 F.2d 441, 445 (D.C. Cir. 1991). It was error for the ALJ to resurrect this allegation, and even more egregious for him to find facts to support it.

[18] The ALJ, again, misrepresented the record writing that Premo's view of Bishop's tirade was obstructed by a "shoulder high partition ..." (Dec. at 7: 28-29). There was no such partition. The actual record evidence reveals that Premo had an ***unobstructed*** view of Bishop and Bock because there was no partition. The partition separated Premo from Ing who sat across from her, not Bishop who stood next to her. (Tr. 896, 899, 905-906).

she found the whole situation very scary. (Tr. 895). Premo's testimony described Hunter Bishop as very close to Bock during the confrontation, about one and a half feet apart. (Tr. 894).

This was wholly consistent with Vierra's testimony. Even Nako testified that Bishop was between the filing cabinets and the bathroom door. (Tr. 222). Premo testified that Nako told Hunter, in a normal tone of voice, that it was okay. Nako also testified that she told Bishop she would be okay. (Tr. 220, 312). Bock further corroborated this statement during his testimony. (Tr. 969). Nako told Bishop that if she needed him, she would call him; that she was just going to talk to David. She said she was fine. (Tr. 895). She also admitted the confrontation between Bock and Bishop made her uncomfortable. (Tr. 312, 313). It took Nako telling Bishop to "stand down" to extinguish the explosive situation.

Bishop went to his desk and immediately phoned Wayne Cahill, yelling over the phone about the situation. (Tr. 899-900). Bishop was perfectly aware that he had "crossed the line" again.[19] This is clearly relevant to the fact that even Bishop knew he was about to be discharged for cause. He knew he had – again – lost his temper and had openly, notoriously and insubordinately confronted Bock in front of others for the last time.

The ALJ discredited Premo because she was a *Beck* objector. (Dec. at 7: 29-32). This was clear error. Employees have a Section 7 right to be *Beck* objectors under *Communication Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641 (1988). Premo's testimony[20] was consistent with the testimony of Bock, Vierra, and Sledge. It was also consistent with Nako, one

[19] After his suspension, Bishop e-mailed Cahill, stating he knew he was going to be fired this time (R. Ex. 360(rejected)). This was clearly an admission against interest. The ALJ erred in refusing to admit this damning document. The document clearly makes credible the testimony of Premo, Vierra, Sledge, and Bock, and discredits Bishop.

[20] Premo was also the ***only*** witness (including Bishop) who testified to Bishop telephoning Cahill immediately after Nako met with Bock. (Tr. 900).

of the General Counsel's witnesses. *Beck* status – ***a statutory right*** – cannot be used to discredit a witness. The ALJ's bias, in this regard, was telling. The ALJ discriminated against Premo because she exercised a statutory right. This irony should not go unnoticed by the Board.

The credibility determinations of the ALJ concerning the Bishop confrontations cannot stand. Substantial evidence in the record as a whole did not support the ALJ's credibility determination. The ALJ did not resolve the issue of credibility based primarily on demeanor. Under the recent Board decision in *Marshall Engineered Products*, 351 NLRB No. 47 (2007), such credibility findings constituted error.

2. Hunter Bishop's Discharge Was the Final Step in a Long Path of Progressive Discipline.

Hawaii Tribune-Herald's action in discharging Hunter Bishop was just the final step in a long path of progressive discipline. The ALJ erred in not considering the complete disciplinary record of Hunter Bishop. The Guild has grieved and/or arbitrated any discipline of Hunter Bishop. It has consistently lost every case. In every grievance pursued to arbitration, the Guild always stated that the company was motivated by anti-union animus. In each and every case, the arbitrators involved rejected that position. (R. Ex. 317-322; Tr. 157-65).

Bishop's disciplinary record was well-documented. Why the ALJ paid no heed to Bishop's disciplinary record made no sense, and suggested the bias associated with his decision. Bishop's disciplinary record entailed:

1. July 1, 1999 letter warning Bishop that his departure, without notice, for "union business" ... "demonstrated a ***lack of professionalism on your part and a lack of respect for and courtesy to newsroom management***." (R. Ex. 6)(emphasis added).

2. An August 27, 1999 one-day suspension for ***dishonesty, insubordination, and disrespect for disobeying Editor Gene Tao*** and scheduling an unauthorized union meeting. (R. Ex. 8)(emphasis added).

3. An April 25, 2002 warning, from Editor David Bock for ***rude and unprofessional behavior that amounted to insubordination*** for interrupting Associate Editor Richard Palmer and making snide remarks to Palmer while Palmer was directly interacting with a customer. Significantly, the warning stated, "***Your pattern of behavior*** leaves me no other choice [but to write this note]." (R. Ex. 13)(emphasis added).

4. A June 20, 2002 suspension "for ***unprofessional and insubordinate behavior***" when Bishop stormed into Bock's office and "in a hostile, confrontational manner," criticized Bock's "terrible news judgment," regarding submissions to Society of Professional Journalism competition. Bock specifically criticized Bishop for his ***hostility and confrontational manner***. (R. Ex. 14)(emphasis added).

5. A January 14, 2003 arbitration award denying a grievance asserting that Bishop was retaliated against for having attempted to represent a bargaining unit employee in a meeting with David Bock. (R. Ex. 317).

6. A February 24, 2003 arbitration decision upholding a grievance and concluding that just cause existed for warning Bishop for his conduct toward Associate Editor Richard Palmer and calling Palmer "a liar." Significantly, the arbitrator stated, "I find and conclude that ***the grievant acted inappropriately and that the employer's attempt to correct his conduct through a written warning was not contrary to the principles of just cause. More precisely, I find that the weight of the evidence does demonstrate that just cause did exist to discipline the grievant and that the level of discipline was not in conflict with the principles of just cause***." (R. Ex. 318 at p 17-18)(emphasis added).

7. An April 19, 2003 arbitration award upholding Bishop's suspension for his behavior towards Bock for not submitting one of Bishop's article to the Society of Professional Journalist competition. (R. Ex. 319). The arbitrator concluded that ***Bishop's "conduct was considerably in duration in berating Bock***." (*Id* at 17). Significantly, the union argued that Bishop's behavior was not egregious, Bishop had received a written warning two months earlier for confrontational behavior which "weakens any argument that a one-day suspension constituted arbitrary discipline." (*Id* at 18). Finally, the arbitrator concluded that ***Bishop's "conduct 'crossed the line' and constituted egregious conduct justifying the one-day suspension***." *Id*. (emphasis added)

8. A February 7, 2006 arbitration award that concluded a letter written to Bishop for abruptly departing work for Guild duties. The arbitrator concluded that the letter – which contained no discipline – was not "issued for improper or discriminatory purpose in violation of the [CBA] ***or Section 8(a)(3) of the National Labor Relations Act***." (R. Ex. 320 at 18)(emphasis added).

9. A February 8, 2006 arbitration award concluding that *Hawaii Tribune-Herald* had just cause to issue Bishop a memo warning him that he was not meeting his expected productivity of one byline story per day. (R. Ex. 321). The arbitrator found

unpersuasive the Guild's allegations that Bishop was treated differently and retaliated against because of his activity on behalf of the Guild and specifically stated "despite the oral counseling received in May 2002 advising Unit Chair Bishop he was required to increase his byline story production in comparison to that of the other full-time daytime reporters, Unit Chair Bishop's story production still lagged behind his fellow reporters." (*Id* at 11). The arbitrator specifically concluded there was no disparate treatment under the CBA "***or Section 8(a)(3) of the National Labor Relations Act***." (*Id*).

10. A February 9, 2006 arbitration award upholding Bishop's suspension, without pay, for failing to increase his byline story production. (R. Ex. 322). The arbitrator specifically wrote:

> Finally, while it is noted Editor Bock's testimony exhibited an underlying tone of frustration, the arbitrator concludes it was the methods of Unit Chair Bishop's activities which went beyond the reasonable bounds of protected Guild activity and generated Editor Bock's pique. Thus, on April 25, 2002, Editor Bock issued Unit Chair Bishop a written warning for "rude and unprofessional behavior" toward Associate Editor Palmer as he was about to photograph a candidate for city council.
> ***
> Accordingly, in view of the regrettable history over the past several years between Unit Chair Bishop and Editor Bock wherein his performance of Guild activities, ***Unit Chair Bishop "crossed the line" and thus exceeded the reasonable bounds of protected activity, the arbitrator must conclude Editor Bock's evident frustration stems in overwhelming measure from unprotected activity***. (*Id* at 20-21)(emphasis added).

The fact of the matter is that on October 18, 2005, Bishop engaged in unprotected activity for which he had been repeatedly warned and disciplined. He was disrespectful and disruptive. For the ALJ to pay no heed to Bishop's exhaustive disciplinary record was unconscionable. Bishop's long disciplinary record makes clear the decision to discharge him is legitimate. There was no evidence of pretext.

In *Court Square Press, Inc.*, 235 NLRB 106, 107 (1978), the Board, in adopting the Decision of the ALJ, recognized that the employee was warned about inappropriate workplace conduct (performing calisthenics while the press was running, and received three warnings about

eating on the job). *Id*. The employee was discharged and claimed that his discharge was motivated because of his union activities. This argument was unpersuasive as the employee had been hostile and insubordinate towards his supervisor. Further, the employee:

> ...had to be warned repeatedly against infractions of company rules ... He was disrespectful and insubordinate toward his supervisor in the presence of other employees on at least two occasions, the second of which precipitated his termination. In addition, his production level was far below that which his supervisor knew him to be capable of, despite repeated warnings to improve his performance. His discharge under these circumstances was warranted. Management cannot be faulted for viewing [the employee]'s behavior as "poor attitude" and "unsatisfactory job performance.

235 NLRB at 109 (citing *Wabash Smelting Inc.*, 195 NLRB 400 (1972). Further, in *Court Square Press*, the Board explained:

> the right of an employer to maintain to order and insist on a respectful attitude by its employees towards supervisors is an important one...
>
> Verbal abuse directed at an employee's supervisor ... would, if let undisciplined, tend to diminish the respect of other employees for their employer and encourage insubordinate conduct by them.

Id. (quoting *Great Dane Trailers Inc.*, 204 NLRB 536 (1973)).

Bishop's discharge was just like that of the employee in *Court Square Press*. Bishop had been repeatedly warned and disciplined about his behavior. On October 18, 2005, Bishop, again, crossed the line. Union affiliation had nothing to do with his suspension and discharge; Bishop's suspension and discharge had everything to do with his continued misconduct. The ALJ's Decision to view Bishop's behavior without consideration of Bishop's voluminous disciplinary record should not stand under scrutiny. The ALJ's Decision amounted to intellectual dishonesty and disregard for *Hawaii Tribune-Herald*'s legitimate prerogative to "insist on a respectful attitude by Bishop toward Bock."

In *The Fresno Bee*, 337 NLRB 161, 162 (2002), the Board criticized the ALJ for failing to recognize that a discharged employee's record contained previous warnings for misconduct.

The Board specifically stated, "The Board does not substitute its own judgment for the employer's as to what discipline would be appropriate." *Id*. Ironically, the ALJ, in the part of the decision that was adopted by the Board, concluded that other employees were discharged for legitimate reasons because of misconduct (abuse of sick leave). *Id.* at 1185-86. The previous warnings, and subsequent discharge for violation of company expectations was legitimate and the Board, again, stated that it "will not substitute its judgment for the employers as to what constitutes appropriate discipline." *Id* at 1185).

In the same vein, the ALJ substituted his judgment for that of *Hawaii Tribune-Herald* as to what constituted appropriate discipline for Bishop's misconduct. Again, this was not an isolated incident; the Guild had lost three arbitrations on this very issue. Bishop "crossed the line," again on October 18, 2005 and his behavior justified his termination. Finally, as stated in *National Semiconductor Corp.*, 272 NLRB 973, 981 (1984):

> Section 7 rights are not a sort with which one may threaten or curse supervisors ... and even if the Respondent welcomed the opportunity to discharge [the employee] that does not make the discharge unlawful under the Act, if he would have been terminated in any event. The Act does not protect employees from their own misconduct or insubordination. This is true even where union animus is present. (noting citations omitted).

Hawaii Tribune-Herald does not admit that it had union animus towards Bishop, but even assuming, *arguendo*, that there was animus, that animus does not act as a shield to prevent Bishop's suspension and termination. The record demonstrated that Bishop had been repeatedly disciplined for this exact type of misconduct; the Act did not protect him. The ALJ erred in concluding otherwise.

C. BISHOP'S SUSPENSION AND TERMINATION WERE LAWFUL.

The ALJ erred in concluding that Bishop's suspension and termination violated the Act. The ALJ viewed Bishop's conduct in a vacuum and failed to consider ***any*** record evidence

demonstrating that Bishop's behavior was a pattern, and not a one-time instance. Further, the ALJ's conclusion that Bishop acted in a union capacity was sophistry. There was no record evidence to demonstrate that Nako ever asked for a *Weingarten* representative. Bishop attempted to insert himself into a private conversation between Bock and Nako. Tellingly, the ALJ described the exchange as a "confrontation," but attempted to downplay the severity of Bishop's misconduct. (Dec. at 28: 36). Additionally, every witness who testified contradicted the ALJ's conclusion that Bishop's confrontation of Bock did not disrupt the workplace. Finally, Bishop's post-discharge conduct warranted his discharge; the Complaint failed to contest otherwise.

D. AFTER-ACQUIRED EVIDENCE FURTHER SUPPORTS BISHOP'S TERMINATION.

The ***General Counsel*** introduced into evidence, as an exhibit, *Hawaii Tribune-Herald's* February 28, 2006 letter to Bishop explaining that *Hawaii Tribune-Herald* had discovered an additional reason for his termination (poor productivity), that if known prior to his termination, "would have been an additional and/or independent reason for [Bishop's] discharge." (G.C. Ex.5; Tr. 1023-24). The record in this case is devoid of a scintilla of evidence to rebut the fact that Bishop's productivity missed the mark. Further, since his discharge, Bishop's post-employment conduct ruined reinstatement as an equitable remedy, assuming, *arguendo*, that Bishop was entitled to reinstatement.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), the Court held that an employee's misconduct during employment, that is later discovered by a company, limits the equitable award of reinstatement, back pay, and frontpay. Courts have echoed this tenet. *See, e.g. Sellers v. Mineta*, 358 F.3d 1058, 1064 (8th Cir 2004)("Our conclusion that an employee's post-termination conduct can, in some circumstances,

limit an employee's remedies for a wrongful discharge is not a new one. For example, we have previously concluded that a terminated employee could forfeit the remedy of reinstatement under the National Labor Relations Act where he threatened his supervisors post-discharge." (citing *Precision Window Mfg., Inc. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992)); *also see General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986).

The Board recognized the after-acquired evidence rule even before *Nashville Banner.* In *Vilter Mfg. Corp.*, 271 NLRB 1544, 1546 (1984), the Board held that an employer did not commit an unfair labor practice when it refused to reinstate an employee pursuant to an arbitration award, because the employer learned, in the arbitration hearing, that the employee had lied in order to receive unemployment benefits to which he was not entitled. Similarly, in *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993), an employer learned – after an employee (supervisor)'s termination – of on-the-job sexual misconduct, which justified his termination, even though the stated reason for termination was deemed a pretext.

Similarly, in a post-*Nashville Banner* case, *Wallace Int'l de Puerto Rico*, 324 NLRB 1046, 1047 (1997)(Chairman Gould, in concurrence), explicitly acknowledged that post-termination conduct affects a potential remedy, writing, "The conduct of an unlawfully discharged employee does and should affect the remedy. See, e.g., *Precision Window Mfg. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992)." The Board reached an identical conclusion in *Precoat Metals*, 341 NLRB 1137, 1141 (2004)(Employee not entitled to reinstatement because of false statements made to Board agents during investigation, and at hearing; employee's later learned acts of dishonesty – lying to co-workers and falsifying documents – rendered discharged employee "unfit for reemployment with the Respondent Employer and that it would not effectuate the policies of the Act to order his reinstatement.").

After Bishop's termination, *Hawaii Tribune-Herald* learned that Bishop had not maintained a productivity standard for which Bishop had previously been disciplined. (Tr. 1023-24; R.Ex. 322). In two arbitrations, an arbitrator concluded that *Hawaii Tribune-Herald* had just cause to impose discipline ***and*** there was no anti-union animus. (Tr. 163-165; Ex. 321, 322). Upon realizing, after his termination, of Bishop's continued poor production, *Hawaii Tribune-Herald* sent Bishop the February 28, 2006 letter, explaining that his continued failure to meet a legitimate productivity standard constituted an additional reason for Bishop's termination.[21]

E. BISHOP'S MISCONDUCT FOLLOWING HIS TERMINATION REMOVED REINSTATEMENT AS AN EQUITABLE REMEDY THAT EFFECTUATES THE POLICIES OF THE ACT.

Bishop's conduct towards and regarding *Hawaii Tribune-Herald* following his discharge irreparably damaged the relationship to the point where reinstatement would not effectuate the policies of the Act.[22] Bishop deliberately sought to undermine *Hawaii Tribune-Herald's* image in the community, disparaged the quality and honesty of the newspaper, and denigrated *Hawaii Tribune-Herald*.

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[21] Bock's February 28, 2006 after acquired evidence letter is totally credible. (G.C. Ex. 5). The ALJ's finding to the contrary is error. (Dec. at 32: 24). Its timing is consistent with his March 3, 2006 meetings with Smith and Armstrong to go over their story count. (Tr. 1022-1024). Editor Bock was reviewing the story count of all reporters in early 2006, not jut Bishop's count. The General Counsel introduced the letter. (Tr. 104). The ALJ's bias was telling when the ALJ said to Burns, "Well Exhibit 5 is in the record. It was offered by General Counsel. It does go into productivity as an additional reason after Mr. Bishop's discharge for failing – I'm not sure why General Counsel offered 5, but it's in the record." (Tr. 1023). Further Bock's testimony was unrebutted on the point of the timing of his story count. General Counsel failed to present any evidence proving Bock knew of Bishop's deficient story count as of October 27, 2005.

[22] The ALJ also, without explanation, changed established Board precedent and ordered backpay for Bishop (and Smith) "computed on a ***quarterly basis***..." (Dec. at 39: 32). Compounded quarterly (and daily) interest has been rejected by the Board. *See Rogers Corp.*, 344 NLRB 504 (2005); *Nat'l Fabco. Mfg.*, 352 NLRB No. 37 (2008); *Mega Force Prods Corp.*, 352 NLRB No. 27 (2008).

On December 6, 2005, Bishop, at a speech at the University of Hawaii at Hilo, proclaimed that *Hawaii Tribune-Herald* "shortchanged" the community. (Tr. 184-86; R.Ex. 87). Bishop informed the public that the *Hawaii Tribune-Herald* newsroom failed to adequately serve the best interests of its readers. (Tr. 186). Bishop also disparaged *Hawaii Tribune-Herald* by claiming that mail and faxes were "unopened and unread … continued to pile up," which was an example of one of ***many tasks neglected by Hawaii Tribune-Herald***. (*Id*).

Bishop even went so far as to obtain an estimate on the cost of publishing a competing newspaper – a disloyal act explicitly prohibited by the CBA. (Tr. 1272; G.C. Ex. 17 at 19; R.Ex. 361(rejected) (E-mail from Hunter Bishop to Burrell dated March 2, 2006 which said, "Coincidentally, today I received an estimate for printing a strike paper, which I had called a local printer about last week."). The ALJ committed grievous error here. Do you let the horse escape the corral before closing the gate? Planning a competing paper is disloyal and violated the CBA. There is no better cause for discharge than disloyalty. As the Supreme Court stated in *Jefferson Broadcasting*, "there is no more elemental cause for discharge of an employee than disloyalty to his employer." *NLRB v. Local Union No. 1229 v. Int'l Broth. of Elec. Workers (Jefferson Broadcasting)*, 346 U.S. 464, 472, 74. S.Ct. 172, 98 L.Ed. 195 (1953).

And Bishop was an active "blogger," using his blog as a forum to denigrate *Hawaii Tribune-Herald*.

On April 1, 2007, Bishop wrote, in relevant part:

> Why the Tribune-Herald allows statements like these to go into print without challenge or qualification ***is stupefying***. Somebody beam Scotty up for a visit and show him it's not all grass huts and lava flows down here. And ***bring along the Tribune-Herald***.
>
> Good gosh. Is it any wonder no one hears the pleas of local folks for sensible solutions to our problems, such as roundabouts?

> And ***while I'm picking on the Tribune-Herald***, here's one more groaner in the flu-scare story in today's edition …
>
> (R.Ex. 292)(emphasis added). On April 5, 2007, Bishop wrote, in relevant part:
>
> Privately I've noted with skepticism that the proof of Stephens-owned BIW's alternative voice would be its willingness to criticize its sister publications *Hawaii Tribune-Herald* and *West Hawaii Today*. So I'm surprised that Avery's failed attempt to get a comment from HTH editor Bock made it into the BIW story … ***The Tribune-Herald's failure to support its photographer in this instance, its apparent lack of interest in reporting all that's happening in the community to its readers, and its silence on the issues of journalism and First Amendment rights involved, are sorry reflections on the local daily newspaper's role in the community***. I hope Kubat doesn't face corporate repercussions for her courage in allowing Avery to report the Tribune-Herald's refusal to comment.
>
> (R.Ex. 294)(emphasis added). On September 10, 2007, Bishop wrote, in relevant part:
>
> Sunday's lead story in the *Hawaii Tribune-Herald* on the Office of Mauna Kea Management ***swept several red herring into the net, but managed to avoid the whale on board the boat.***
>
> ****
>
> … it's mind-boggling that the media continue to publish OMKM and the Institute for Astronomy's press releases and discussions about new projects and plans as thought the ruling doesn't exist.

(R.Ex. 300)(emphasis added).

Bishop's continued, derogatory, disloyal, and denigrating statements reflected an individual with contempt for *Hawaii Tribune-Herald*. There would be no "equity" in Bishop's reinstatement, assuming, *arguendo*, that Bishop's termination was not for cause. As the Board stated in *Precoat Metals*, if Bishop was reinstated he "would locate other 'conflicts' that he could create for" *Hawaii Tribune-Herald*. *See Precoat Metals* at 1141. Like the employee in *Precoat Metals*, Bishop "is unfit for reemployment with [*Hawaii Tribune-Herald*] and it would not effectuate the polices of the Act to order his reinstatement." *Id.*

F. *HAWAII TRIBUNE-HERALD* MET WITH AND LATER DISCIPLINED NAKO FOR LEGITIMATE, NON-DISCRIMINATORY REASONS.

The ALJ committed reversible error in finding that Nako was interrogated in violation of Section 8(a)(1) and disciplined in violation of 8(a)(1) and (3) of the Act. His findings were not supported by the record, and were inconsistent with established precedent.

1. It is Within an Employer's Right to Discipline an Employee for Violating Company Policy.

Nako violated the Access Policy when she snuck Nakakura in the back door, without management approval. She admitted to this violation of company policy. (Tr. 251, 334). An employer has the right to determine when discipline is warranted and in what form. "It is well established that '[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline." *Intermet Stevensville*, 350 NLRB No. 94 (2007), citing *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000) (quoting *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969)). *Hawaii Tribune-Herald* had an undisputed right to maintain discipline in its workplace. *Republic Aviation*, 324 U.S. 793, 798, 65 S.Ct. 982, 89 L.Ed. 1372 (1945). Once Nako admitted she violated the Access Policy, the ALJ's analysis should have ended. He conjured facts to find a violation of the Act. This error should be reversed.

2. Koryn Nako Violated the Access Policy and Agreement with the Union by Letting Ken Nakakura into the Hawaii Tribune-Herald *Building on October 18, 2005.*

Nako did not follow *Hawaii Tribune-Herald* protocol when she admitted Nakakura into the facility. When Nakakura met Nako at the employee entrance, Nakakura asked "are you sure it is okay for me to go up with you?," and Nako said "sure." (Tr. 408). ***Nako and Nakakura knew of the access policy and that prior management approval was necessary for Nakakura to***

enter the facility. (Tr. 416). When Nako granted access to Nakakura through the magnetically-sealed, employee entrance, she did not have management approval. (Tr. 210). During the hearing, when asked if she had permission, Nako said "no." (Tr. 1177). This was undisputed. Nako also knew that union representatives were non-employees, and subject to the access policy. (Tr. 295)

Upon learning from Arlan Vierra that Nakakura had entered the building via the employee entrance, Bock properly went to the breakroom and asked how Nakakura entered the facility.[23] Nako said she let him in, and in light of Nakakura's failure to comply with the agreement in place with the Guild, Bock informed Nakakura that he "didn't have an appointment to conduct a meeting of any kind here on the premises, you don't have permission, so I have to ask you to leave." (Tr. 962). This came as no surprise to Nakakura, since he knew of the policy. (Tr. 416). After escorting Nakakura out of the facility, Bock asked to speak with Nako.[24] Editor David Bock's actions were a valid exercise of the company policy, the agreement between the Guild, and management prerogative.

3. Hawaii Tribune-Herald *Legitimately Inquired Whether Nako Knew of Existing Company Policies.*

Hawaii Tribune-Herald was entitled to investigate Nako's breach of the access policy as potential misconduct, without interference from any of its employees – including union officials.

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[23] The ALJ's Decision, in this regard was indicative of a failure to review all record evidence. The ALJ would have the Board believe that Bock appeared at the breakroom as if by magic. (Dec. at 5: 9-17). Bock went to the breakroom because Vierra ***reported*** an unauthorized access by Nakakura. (Tr. 925).

[24] Nako agreed to meet with Bock, and at no point protested Bock's request. (Tr. 299). Nako even told Hunter Bishop that she would get him if she thought that she needed to have someone with her. (Tr. 220). She never asked for Bishop or any other witness during the meeting (Tr. 972).

See Manville Forest Prods., 269 NLRB 390, 391 (1984). Quite frankly, it was absurd for the ALJ to find that Bock had no valid basis for questioning Nako. (Dec. at 17: 23-38, 31-32; Dec. at 23: 33-35). Nako's statement that she let him in, but not to conduct any union business divorced Nakakura's visit from any union activity, and gave Bock a more than legitimate reason to meet with her regarding the access policy. (Tr. 214-15). This was especially true since Nako was dishonest with Bock.[25] Nako's misdirection regarding Nakakura's reason for being at *Hawaii Tribune-Herald* further justified Bock and Crawford investigating the matter. Nako admitted to misconduct and *Hawaii Tribune-Herald* had the obligation to investigate further to determine what, if any, discipline was appropriate.

The meeting with Bock was informational, pointing out the policy regarding union officials.[26] (Tr. 224). Bock was not angry, nor did he raise his voice. (Tr. 299). Bock simply confirmed that Nako knew of the access policy, which Nako confirmed. (Tr. 289, R. Ex. 330). Further, Nako acknowledged familiarity with a separate agreement with the Guild about access to the facility. Nako stated, "I think I heard that the union isn't supposed to meet, conduct meetings on company property without an arrangement." (Tr. 972-73). While meeting with Bock, Nako apologized for violating the access policy. (Tr. 322). Nako knew that *Hawaii Tribune-Herald* did not allow union officials on property to conduct union business. In fact, Nako stated she did not ***want*** Nakakura to come through the front lobby. (Tr. 224-225, 299). She tried to avoid responsibility for her violation of the policy by saying that Nakakura wasn't

[25] Throughout the meeting, Nako reiterated the falsehood that Nakakura was not there to conduct any union activities, when in reality, he was. (Tr. 226, 356-57). At the hearing, Nako admitted that the note Nako gave Nakakura related to union business. (Tr. 357).

[26] It should be noted that the *Weingarten* allegation regarding this meeting was withdrawn when 37-CA-7045 was amended on March 27, 2007, over one year after the original filing of the charge.

there for union business. (Tr. 224-25). At the end of the meeting, Bock informed Nako that he would have to tell Bill Crawford, her supervisor, once he returned to the office. (Tr. 322).

4. Hawaii Tribune-Herald *Legitimately Investigated Nako's Breach of the Access Policy on October 21, 2005; It was Not an Interrogation to Investigate and ask Questions Regarding Violations of Company Policy.*

At the October 21, 2005 meeting with Crawford and Bock, Nako admitted using bad judgment in letting Nakakura into the building. (Tr. 401, 984, 1178). She admitted awareness of the policy regarding union officials, and that she had received the policy letter. (Tr. 249, 251 980, 983 R. Ex. 330). She again acknowledged that she let Nakakura in without management approval.[27] (Tr. 334, 980-81). She even told Crawford, again, that Nakakura was not there for union business; he did not need to speak with management; nor need pick up any new hire documentation. (Tr. 340, 1177, 1178).

At this point Crawford rightfully asked, "Well, then, what exactly was your business with him, and bringing him into the building?" (Tr. 1178). Nako replied saying that she had a piece of paper to give Nakakura. (Tr. 1178). Upon learning this, Mr. Crawford asked if the document/note could have been mailed. (Tr. 253). Nako confirmed that she could have delivered the note at a later time, like after hours, or simply going to the Guild office in Hilo. She also said she could have arranged to do it outside of working time. (Tr. 984, 1179).

Nako said the meeting with Nakakura was not for union business. If Nako was truthful at the October 21, 2005 meeting, then *Hawaii Tribune-Herald* could not have been asking Nako about union business – she denied that Nakakura was present for union business. If she was

[27] Bock testified that neither he nor Crawford asked her about the contents of the note once Nako said it was union business. (Tr. 984). Crawford did not learn the contents of this note at the October 21, 2005 and to this day still does not know the contents of the paper. The ALJ's finding that they discovered what was in the note is incorrect and error. (Dec. at 28: 2-4).

lying, which it turns out she was, then *Hawaii Tribune-Herald* was privileged to question her as part of its investigation into an unauthorized use of *Hawaii Tribune-Herald's* property for conducting union business. *Hawaii Tribune-Herald* had the right to protect its private property rights. For the ALJ to find that there was no valid basis for issuing a written warning constituted error in light of the record, and case law protecting an employer's right to discipline employees. (Dec. at 28: 6-7).

Moreover, reliance on *Westwood Healthcare*, 300 NLRB No. 141 (2000) and *Cumberland Farms*, 307 NLRB 1479 (2002), is misplaced.[28] (Dec. at 15: 15, 38). *Cumberland Farms* was an organizing case. *Westwood* rejected the idea that the *Bourne* factors were to be applied in some kind of limiting, formulaic manner; instead, the Board said those factors served as useful indicia (not prerequisites) for a starting point in a ***totality of the circumstances analysis***. *Westwood*) at 939-940. Also, the inquiry in *Bridgestone Firestone South Carolina*, 350 NLRB No. 52 at *5 (2007) was limited to "yes/no" questions; for the ALJ to use this case as an example of circumscribed questioning strains belief. (Dec. at 15: 40-47). Such a standard is overly burdensome and irrational. Such questioning does not lend itself to thorough investigations nor to the possibility of insightful, unsolicited answers. The finding of unlawful interrogations should be reversed and dismissed. The ALJ essentially created a standard whereby every misconduct investigation violates the Act.

6. The January and February Interrogations were Fiction.

The ALJ found that the alleged January and February 2006 meetings between Nako and Crawford took place. (Dec. at 23: 18-31). He continued to find that Crawford used these

[28] The ALJ erred in his summation and reliance of *United States Automobile Assn.*, 340 NLRB 784 (2003). (Dec. at 15: 51-52; 16: 1-4; 17: 30-35); the company never admitted it had an invalid no-distribution policy. *See* 340 NLRB at 785.

meetings as an opportunity to discover Nako's union activity, in violation of Section 8(a)(1) of the Act. (Dec. at 23: 35-37). However, Crawford did not meet with Nako in January and February regarding grievances.[29] Nako could not even recall when these purported meetings occurred. (Tr. 262, 266, 270). The only discussion of the grievance took place on November 15, 2005. (Tr. 1202, 1205-06). This meeting was simply informational.

Crawford spoke to Nako on November 15, 2005 as a courtesy to Nako as they had a great professional and personal relationship. (Tr. 1173-74). In fact, Nako admitted that Crawford never made any threats toward her, and that nothing would happen to her as a result of a grievance being filed. (Tr. 360, 364). Nako even told the Region, in her affidavit, that Crawford told her that "he was not here to influence me in any way but just to make sure this is what I wanted." (Tr. 365). Nako said she never felt threatened by him during their meetings (Tr. 288). According to Nako's testimony, the only mention of the Guild was that they had filed a grievance. (Tr. 268-69). This evidence should have ended the matter.

Undeterred, the ALJ made unsupported findings about Crawford's intentions, what he said, and when he said it, based on the inconsistent testimony of Nako. (Dec. at 6: 30-31, 35-38, 51; Dec. at 7: 1-2, 48-50; Dec. at 23: 26-31). The ALJ's findings conflicted with and were unsupported by the record.

G. THE FINDINGS BY THE ALJ REGARDING INFORMATION REQUESTS REPRESENT REVERSIBLE ERROR.

The ALJ ignored the record, and found that *Hawaii Tribune-Herald* violated Sections 8(a)(1) and (5) of the Act by failing to furnish information requested by the Guild regarding

[29] The ALJ improperly overruled a number of objections to questions surrounding these non-existent meetings. (Tr. 265, 269, 270, 271).

Nako and Bishop. (Dec. at 36: 16-19, 24-25; Dec. at 38: 9-11). Once again, such findings represent reversible error.

1. The Requests by the Guild were Neither Relevant nor Necessary to Performing its Duty as Collective Bargaining Representative.

The ALJ's analysis stemmed from an inaccurate premise – that such requests by the Guild were relevant and necessary. (Dec. at 35: 26-28). *Hawaii Tribune-Herald* complied with its duty to provide relevant information to the Guild. *Hawaii Tribune-Herald* had a duty to respond to the Guild's relevant information requests in a timely manner, which it did. *See Amersig Graphics, Inc.,* 334 NLRB 880, 885 (2001). The Guild knew exactly why Bishop and Nako were disciplined, and their requests for additional information were really just attempts at pre-arbitration discovery.

2. **Hawaii Tribune-Herald** *had No Duty to Provide Witness Lists or Statements to the Guild.*

The ALJ erred when he found that the failure to turn over witness names and/or employees interviewed surrounding the Bishop investigation violated the Act . (Dec. at 36: 16-25). The Guild demanded a list of witnesses to Bishop's misconduct, at the November 15, 2005 meeting, and Bock replied that he did not have any such list. (Tr. 996). *Hawaii Tribune-Herald* could not turn over information it does not have. Still, the ALJ concluded *Hawaii Tribune-Herald* had to provide a non-existent witness list.

Further, *Hawaii Tribune-Herald* was under no obligation to provide the Guild with Nako's statement. In *Anheuser-Busch Inc*., 237 NLRB 982, 984 (1978), the Board stated that witness statements were not information to which a union was entitled as part of an information request. It is inconceivable that the ALJ found this case to be inapplicable. (Dec. at 36: 8-9). The Board stated:

> We do not believe that the principles set forth in *Acme* (*NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1976)) and related cases dealing with the statutory obligation to furnish information may properly be extended so as to require an employer to provide a union with statements obtained during the course of an employer's investigation of employee misconduct.
>
> Requiring pre-arbitration disclosure of witness statements would not advance the grievance and arbitration process.

Id. The Board also expressed concerns about disclosing statements and the names of witnesses because "employers, or in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." *Anheuser-Busch* at 984 (citing *NLRB v. Robbins Tire and Rubber Co.*, 98 S.Ct. 2311, 2325 (1978)). The Board concluded "requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process."[30] *Id*. Based on *Anheuser-Busch* alone, Nako's statement did not need to be furnished to the Guild. The ALJ's contrary finding was reversible error. (Dec. at 15-16)

Additionally, the Guild was not entitled to Nako's October 19, 2005 statement because it was prepared at the direction of counsel in anticipation of litigation. (Tr. 1141, 1145). In *Sprint Communications, d/b/a Central Telephone Co. of Tx.*, 343 NLRB 987, (2004), the Board recognized that documents prepared in anticipation of litigation were not subject to an information request. Work product protection applied where a "document was created because of anticipated litigation, and would not have been created in substantially similar form but for the

[30] Additionally, the Board recognized that the company, in *Anheuser-Busch*, did not withhold from the union its views of the incidents that resulted in the employee's disciplinary suspension and in no way impeded the union's investigation of the employee's grievance. (*Anheuser Busch* at 984). The same was true in the instant case.

prospect of that litigation." *Central Tel.* at 989 (2004); *see also U.S. v. Adlman*, 134 F. 3d 1194, 1195 (2nd Cir. 1998).

In order to meet this standard, the party representative "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." (*Central Tel.* at 988-989 (citing *In Re Sealed Case*, 146 F. 3d 881, 884 (D.C. Cir. 1998)). The prospect of litigation need not be actual or imminent; and need only be fairly foreseeable. (*Id.* at 989, citing *Coastal States Gas Corp. v. Dpt. of Energy*, 617 F. 2d 854, 865 (D.C. Cir. 1980)). The ALJ found that Nako's statement was not protected by the Attorney Work-Product privilege because there was no subjective or objective reasonable possibility that the Guild would request arbitration. (Dec. at 36; 44-46).

The ***same day*** Bishop was suspended, the Guild filed a grievance contesting the suspension. (G.C. Ex. 20). Bishop had been the subject of six arbitrations over the past two years. (R. Exs. 317, 318, 319, 320, 321, 322). If these factors do not create a "reasonable objective belief that litigation was possible," nothing does.

The ALJ also erred in his analysis of *New Jersey Bell Tel. Co.*, 300 NLRN 42 (1990). *New Jersey Bell Tel,* did not set up a two-part test for protecting witness statements; it simply distinguished the facts before them from *Anheuser-Busch*. *Id.* at 43. Further, the facts of *New Jersey Bell Tel.* were distinguishable. First, the investigation involved a customer, not an employee. Second, the customer did not review the report, have it read to them at any point, or in any manner adopt it as their own statement. *Id.* at 43. There was no evidence to support that the report approximated a verbatim transcript of the customer's statements; instead, it reflected management's impressions of what transpired and included what they felt appropriate to include in the report. *Id*. This was drastically different from the instant case.

In *Central Tel.*, the Board found that investigation notes prepared in anticipation of litigation were not created in the ordinary course of business. *See* 343 NLRB at 989. The Board noted that a company representative immediately contacted their in-house attorney upon receiving information about the alleged serious misconduct of four union officers, which supported the company's contention that it had subjectively anticipated litigation. *Id*. This was exactly what happened at *Hawaii Tribune-Herald*. The Board went on to say "furthermore the Respondent's fear of litigation was objectively reasonable. In the world of labor relations the discharge of four union officers, including the local union president, were actions taken in their capacity as union officials, would likely (albeit not inevitably) result in the union pursuing arbitration or filing an unfair labor practice charge." *Id*. at 989. In addition, as explained in *Hertzberg v. Veneman*, 273 F.Supp.2d 67 (D.D.C. 2003), Fed.R.Civ.Pro. 26(b)(3) extends the attorney work product privilege to:

> Materials prepared by or for ***any party or by or for its representative***; they need not be prepared by an attorney or even for an attorney. "While the 'work product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer.

Hertzgerg at 76. (emphasis in original) (quoting *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977), and citing *United States v. Nobles*, 422 U.S. 225, 238-39 95 S.Ct. 2160, 45 L.Ed.2d. 141 (1975)).

Bishop was Guild Unit Chairperson and an outspoken union member, and based on the six consecutive arbitrations that Guild had recently lost which involved Bishop, plus a grievance filed the day of his suspension, it was obvious to and objectively foreseeable *Hawaii Tribune-Herald* that the Guild would once again contest Bishop's discipline. (R. Ex. 317-322). Nako's affidavit was by no means part of any ordinary course of business – it was done pursuant to the request of *Hawaii Tribune-Herald*'s counsel, because it was clear the union would be filing a

grievance and/or unfair labor practice.[31] (Tr. 1141). The ALJ's finding on this issue severely and impermissibly restricted an established tenet of the law, and should be reversed.[32]

3. There was no Unreasonable Delay in Providing Hunter Bishop's Personnel File.

There was no "unreasonable delay" in providing requested information to the Guild.[33] The duty to furnish requested information is neither rigid nor unreasonable. It requires no more than an honest effort to provide whatever information is requested as promptly as circumstances allow. *See Decker Coal Co.,* 301 NLRB 729, 740 (1990). The delay for sending out Bishop's personnel file was due in part to this busy time; however the delay was not intentional. (Tr. 1082). The ALJ erred in finding that Bock's testimony as to why it took so long was a "vague and unsupported explanation." (Dec. at 36: 33-36). Further, reliance on *Regency Service Carts*, 345 NLRB No. 44 (2005), was misplaced. (Dec. at 29-30). *Regency Service Carts* is distinguishable, as the company there either failed to provide a reason why it would not furnish information or said they were irrelevant requests. *Id*.

Bock, however, informed Cahill at the November 15, 2005 meeting at the Naniloa Hotel, that *Hawaii Tribune-Herald* was compiling Hunter Bishop's personnel file and Cahill could expect the information as soon as it was ready. Bock testified that the Fourth quarter was the

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[31] The Guild's penchant for filing charges is obvious. In 2006 and 2007, the Guild filed over twenty charges against *Hawaii Tribune-Herald*.

[32] Additionally, the Guild could have obtained the same information without undue hardship – all it had to do was speak with Nako. *See Central Tel.* at 990.

[33] The parties stipulated that Bishop's personnel file was mailed on January 26, 2006, return receipt requested. (Tr. 708). The parties further stipulated that this file remained unclaimed until February 24, 2006. (*Id*). Since neither Wayne Cahill nor any other Guild representative picked up the personnel file, it was returned to *Hawaii Tribune-Herald* on March 7, 2006. (*Id*). Cahill did eventually receive Hunter Bishop's personnel file. (Tr. 782-83).

busiest time of the year for the *Hawaii Tribune-Herald*, because of the holiday season. (Tr. 1081-82). Bock explained the ripple effect the holiday season has on the paper, as more advertisements come in, the paper gets bigger, and people work more hours during this time. (Tr. 1082). ***Cahill even admitted knowing that the period of time from Labor Day to Christmas is a busy time and that the Thanksgiving and Christmas editions were particularly large papers***. (Tr. 783-85). There was no basis for the ALJ's finding that Bock's testimony was vague and unsupported. The record did not substantiate a finding that *Hawaii Tribune-Herald* unreasonably delayed providing Hunter Bishop's personnel file, in violation of Sections 8(a)(1) and (5) of the Act. (Dec. at 37: 34-36).[34] This allegation should be dismissed

Bishop's personnel file was cumbersome and voluminous, spread across a number of managers and constituting over an inch worth of paper. (Tr. 1084, 1100). There was not one central location where disciplinary records were kept – the mangers kept information regarding the people they managed. These factors were distinguishable from *Pan-American Grain*, 343 NLRB 318 (2004), another case cited by the ALJ. Most of Bishop's file had been assembled in December, but *Hawaii Tribune-Herald* had to check to make sure that everything was in order, which took additional time. (Tr. 1100). There was a mix-up, which was discovered in December 2005. Upon realizing the mix-up, *Hawaii Tribune-Herald* double-checked the gathered material to make sure the file was complete; the file was sent immediately to the Guild on January 26,

[34] If, however, there were any "unreasonable delay" it would be on the part of the Guild in failing to pick up the information. The Guild's laissez-faire attitude in obtaining this information spoke volumes about the necessity of this information, and demonstrated that the Guild was not harmed by the amount of time it took to cull the documents. Perhaps realizing this, on October 23, 2007 – the hearing – the General Counsel verbally amended the complaint to change the date in Section 9(c) from March 8, 2006, to January 26, 2006. (Tr. 29). The General Counsel was well aware of the original transmission date of the personnel file, and the timing of the complaint amendment was peculiar, to say the least. This charge should be dismissed.

2006. (Tr. 1000-02).[35] Hawaii Tribune-Herald did not delay based on an unlawful conditional bargaining strategy like the employer in *Bundy Corp.*, 292 NLRB 671 (1989), nor did *Hawaii Tribune-Herald* rely on any confidentiality interest like the employer in *Woodland Clinic*, 331 NLRB 735 (2000). These cases, cited by the ALJ, were clearly inapposite. (Dec. at 37: 32-33).

The Board considers the totality of the circumstances surrounding an incident, and has not defined the duty to furnish information in terms of a per se rule. *See West Penn Power Co*, 339 NLRB 585, 587 (2003), enf. in pertinent part 349 F.3d 233 (4th Cir. 2005). What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. *Id.* The Board will consider "the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *E.I. DuPont De Nemours and Co.,* 346 NLRB No. 55 at 53 (2006)(citing *Samaritan Med. Ctr.* 319 NLRB 392, 398 (1995)). In light of the logistical complexity of collating the personnel file and the external, business-based reasons for the delay, *Hawaii Tribune-Herald* did not unreasonably delay in producing Bishop's personnel file. This charge should be dismissed.

4. Hawaii Tribune-Herald *Explained Exactly Why it Discharged Hunter Bishop.*

On November 15, 2005 there was a JCAC meeting regarding Bishop's termination. At this meeting Wayne Cahill asked why Bishop was terminated, what Bishop had said or done that was insubordinate, what Bishop said or did that interfered with *Hawaii Tribune-Herald*'s right to have a meeting with one of its employees, and that he had not received the information that had been previously requested. (Tr. 715-16).

[35] The Guild failed to receive the file and it was returned to *Hawaii Tribune-Herald* on March 7, 2006. (Tr. 1000). The Guild eventually received the file after *Hawaii Tribune-Herald* re-sent it. (Tr. 782-83).

Cahill had a copy of Bishop's termination letter; Bock said that the termination letter spoke for itself. (Tr. 833). Bock provided specific reasons – Bishop's rude, insubordinate and confrontational misconduct for which Bishop had been repeatedly disciplined. (Tr. 828-29, 995). Bock asked Cahill to put any additional questions he had in writing and he would be happy to entertain them at a later date; Cahill never submitted any questions. (Tr. 997). This is not indicative of any reticence to providing information.

The fact of the matter is that Bishop (and the Guild) knew the exact reason for his termination because each possessed Bishop's termination letter. (G.C. Ex. 2; Tr. 996,). In fact, Bishop called Cahill on October 18, 2005, immediately after yelling at Bock; Cahill took copious notes. (Tr. 825; G.C. Ex. 20). Cahill testified that he did not understand why Bishop was terminated after reading Bishop's termination letter, and that even after the JCAC meeting he still did not understand why Bishop was terminated. (Tr. 761). Cahill was simply disingenuous.

Bishop, on the other hand, knew that he had engaged in misconduct. He wrote Cahill an email stating that he had a "***firm belief that I will be fired this time***." (R. Ex. 360(rejected)). It is inconceivable that Bishop knew why he was terminated, yet Cahill claimed to "not understand." There is a difference between not understanding and not wanting to understand. Cahill clearly fell into the latter category.

In spite of Cahill's purported lack of understanding, Cahill spoke to Bishop and somehow managed to immediately file a grievance on October 19, 2005 "in good faith" based on a purposed violation of the CBA. (Tr. 759-60, 764; G.C. Ex. 22). Cahill testified that *Hawaii Tribune-Herald* refused to provide him with information necessary to process the grievance yet,

Cahill processed the grievance anyway "in good faith."[36] (Tr. 767). Cahill also demanded arbitration on Bishop's termination, in spite of not understanding why Bishop was terminated. (Tr. 777; R. Ex. 93). No additional facts were necessary for Cahill to ***process*** the grievance; the Guild demanded arbitration on January 14, 2006 (R.Ex. 93) – ***before*** it filed charge No. 37-CA-7047. Cahill even had enough information – based on Bock's October 31, 2005 letter to Cahill – to create an informational flyer describing, in detail, why Bishop was discharged. (R. Ex. 65). It makes no sense that Cahill could detail why Bishop was terminated in a flyer, yet needed information from *Hawaii Tribune-Herald* to determine why Bishop was discharged.

5. Hawaii Tribune-Herald *Provided the Guild with All Relevant and Necessary Information Regarding the Koryn Nako Grievance.*

On November 29, 2005 there was a JCAC meeting about Nako's written warning.[37] (Tr. 717). In response to Cahill's questions about policies Nako violated, Bock provided Cahill with two documents: Publisher Dixon's February 17, 2004 letter to Cahill (G.C. Ex. 32) and Dixon's March 3, 2004 memo to employees (R. Ex. 330). (Tr. 1013-14). The only information withheld was the Nako witness statement.

As of November 29, 2005 the Guild apparently had all the information it needed as Cahill declared that the Nako grievance was going to arbitration. (Tr. 1016). During Cahill's incredible testimony, which required the ALJ's intervention to extract reluctant responses, Cahill admitted that he spoke with Nako about what happened. (Tr. 786-787). Cahill admitted that he knew enough to determine that *Hawaii Tribune-Herald* lacked just and sufficient cause to discipline

[36] Cahill even testified that he asked Bock questions at the November 15, 2005 JCAC meeting because he "did not think there was any evidence to support the company's position."

[37] Nako never asked the Guild to file a grievance, yet the Guild filed a grievance, anyway. (Tr. 362, 787, G.C. Ex. 25 and 26).

Nako. (Tr. 787). The ALJ's finding that *Hawaii Tribune-Herald* had to provide information in excess of what was provided was without merit.

6. The Guild Attempted to Engage in Pre-Arbitration Discovery.

That the Guild requested information ***after*** demanding arbitration is presumptive evidence that the Guild sought out the information for pre-arbitration discovery purposes. *See Cal. Nurses Assn.*, 326 NLRB 1362 (1998). The Guild did not seek the information for the statutory purpose of contract language interpretation; rather, the Guild sought the information for a non-statutory purpose – pre-arbitration discovery. *See United Nurses Assn. of Cal. (Sharp Healthcare)*, 21-CB-13798 (2005 Advice Memo). It is well-settled that there is no general right to discovery in arbitration proceedings. *Cal. Nurses* at 1362.

In *Cook Paint & Varnish Co*., 648 F.2d 712, 721-22 D.C. Cir. 1981, the court chastised the Board for attempting to compel an employer to produce documents and evidence prior to arbitration. The Court stated:

> [The Board's] suggestion is extraordinary because it fails to comprehend that it is not the function of the Board to structure the manner in which parties to a collective bargaining agreement process and resolve contract grievances. Just as the Board may not decree the time in which a party must respond to a filed grievance, the Board may not attempt spur an employer to "a painstaking investigation at the outset" once a grievance is filed. The method in which disputes are resolved in a grievance-arbitration process is a contractual matter to be determined by the parties. The Board may not construct an inflexible rule that any compulsory interview conducted in preparation for a pending arbitration violates the Act.

The Guild did not need the requested information to determine what position to take in arbitration. *See Armstrong Air Conditioning, Inc.,* 8-CA-34846 (2005 Advice Memo). In both Bishop's and Nako's grievances, the Guild cited specific provisions of the CBA it believed *Hawaii Tribune-Herald* violated; engaged in JCAC meetings; and demanded arbitration. Only ***after*** demanding arbitration did the Guild file an unfair labor practice charge. The Guild,

subsequent to its January 14, 2006 demand for arbitration regarding Nako (R. Ex. 91 (rejected))[38], filed a charge on January 26, 2006. (G.C. Ex. 1(s)). Similarly, the Guild demanded arbitration over the Bishop discipline on January 14, 2006, and then filed its charge on January 25, 2006. (G.C. Ex. 1(a), 93).

The demands for arbitration were unequivocal waivers and/or an admissions that the sought information was not ***necessary to process the grievances***. If the information was truly necessary, the Guild could not have processed the grievances or demanded arbitration. The charge was filed in an attempt to engage in pre-arbitration discovery. The Guild, with assistance of the General Counsel, attempted to manipulate the Act to create a discovery process to arbitration.[39] The ALJ's finding that these information requests were not pre-arbitration discovery attempts was error and should be reversed.

H. DAVE SMITH WAS NOT ENTITLED TO A *WEINGARTEN* WITNESS AND DID NOT ENGAGE IN PROTECTED/CONCERTED ACTIVITY.

1. This is Not a Weingarten *Case.*

This case had no *Weingarten* allegations, yet the ALJ made *Weingarten* findings. This constitutes reversible error. On March 27, 2006, the Guild amended charge 37-CA-7045, ***withdrawing*** its contention that *Hawaii Tribune-Herald* unlawfully denied Nako her *Weingarten* rights on October 18, 2005. (G.C. 1(ooo), Internal Ex. 2). On March 30, 2006 the Guild also withdrew[40] charge 37-CA-7078, alleging *Weingarten* violations at the March 3, 2006 meetings. (G.C. 1(ooo), internal Ex. 1). On October 31, 2006, the Guild withdrew charge No. 37-CA-

[38] This was error to reject this obviously relevant exhibit concerning pre-arbitration discovery.

[39] Such a standard would necessarily apply to unions, as well.

[40] *Ducane Heating*, 273 NLRB 1389, 1390 (1985), enfd. 785 F.2d 304 (4th Cir. 1986)

7081, alleging *Weingarten* violations at Dave Smith's March 3, 2006 meeting.[41] (G.C. 1(ooo), internal Ex. 4). All of these withdrawn charges were exhibits to *Hawaii Tribune-Herald's* Third Amended Answer and in evidence. (G.C. Ex. 1(ooo)).

Counsel for *Hawaii Tribune-Herald* reiterated that this was not a *Weingarten* case in its opening statement. (Tr. 45, 46, 50). The General Counsel[42] echoed, "We're not alleging a *Weingarten* violation." (Tr. 75). The ALJ stated, "I understand there is no *Weingarten* violation alleged. So I'm not considering it." (Tr. 75). The ALJ knew that the withdrawal letters were in evidence, (Tr. 534-535), yet allowed *Weingarten* testimony "as background." (Tr. 75). Despite his ruling that he would allow testimony about *Weingarten* discussions, he refused to order disclosure of the audio file secretly made by Smith on March 3, 2006. (*See* ALJ Ex. 10 for *Hawaii Tribune-Herald*'s Subpoena Duces Tecum and Petition to Revoke Subpoena Duces Tecum; see Tr. 806, 807, 809, 820 for the ALJ's ruling on October 29, 2007). In his own words, "had there been a complaint allegation going to that particular conversation [March 3, 2006], then it may have been relevant, the substance then of the conversation may have been relevant." (Tr. 807). ***The ALJ, however, went on to make findings of fact in his recommended Order that certain meetings, including the March 3, 2006 meeting, were in fact*** **Weingarten** ***opportunities***![43] (Dec. at 18: 42-49; Dec. at 30: 6-7). This was incredible. If the content of the meeting was irrelevant, then the ALJ should not have made findings regarding the validity or

[41] The ALJ committed error by not allowing *Hawaii Tribune-Herald* to ask Smith if he knew he had been properly denied a witness, (Tr. 529, 534) or that the Guild had withdrawn its charge.

[42] *See The Bakersfield Californian*, 337 NLRB 296, 297, 298 (2001)(General Counsel did not contest Respondent attorney's contention that certain allegations were not at issue; later, attempts by the General Counsel to expand the complaint was denied). It is clear error for the ALJ find *Weingarten* violations as the excuse to try to legitimize secret taping.

[43] The ALJ made these findings although *Hawaii Tribune-Herald* objected to *Weingarten*-based questions. (Tr. 503, 75).

application of *Weingarten*. Smith, through the union, filed a petition to revoke *Hawaii Tribune-Herald*'s attempt to obtain a copy of the recording. The ALJ granted the Petition to Revoke. (Tr. 806-807, 809). As a result of this error, the Board should draw the inference that the recording would have substantiated Editor Bock's testimony and not Smith's testimony.

The factual scenario here is reminiscent of the facts in *National Semiconductor Corp*., where an employee requested a witness for a meeting. *National Semiconductor Corp.* at 978, fn. 7. The General Counsel assured that there was no *Weingarten* allegation. *Id*. Based on these assurances, the ALJ ignored that part of the evidence as irrelevant to the issues. *Id*. In the instant case, the ALJ should have made the same ruling; finding of *Weingarten* opportunities that were not alleged in the Complaint constituted gross error.

2. Secret Taping is Not Protected Activity.

Secret taping is not protected conduct. The ALJ erred in finding that Smith's surreptitious tape recording of Editor Bock, was protected by the Act. (Dec. at 19: 32-33). Board, federal, and even state precedent, explains that Smith's misconduct in secretly recording Bock warranted discipline and was not protected.

Secret taping in the workplace is wrong. *Hawaii Tribune-Herald* employee Karen Welsh knew it was wrong. She informed Bock on March 6, 2006 about Smith's misconduct. (Tr. 126). The ALJ erred by precluding Welsh from answering whether she had ever secretly recorded a conversation.[44] (Tr. 126). *Hawaii Tribune-Herald* legitimately expected its employees to be honest. Smith was dishonest; he knew this. Smith knew surreptitious recording was wrong;

[44] Conversely, the ALJ improperly allowed testimony as to whether Welsh was a member of the Guild. (Tr. 151). Her union membership status was irrelevant to whether she saw Smith go in to the meeting on March 3, 2006, with a tape recorder, as this is an undisputed fact.

otherwise, Smith would not have stammered and stalled when asked if Smith still believed he did nothing wrong. (Tr. 528-529).

The Board and the Second Circuit have explained that secret taping is dishonest. Surreptitious tape recordings of collective-bargaining negotiations severely inhibit the willingness of parties to express themselves freely, and seriously impair the smooth functioning of the collective bargaining process. *See Carpenter Sprinkler*, 238 NLRB 974, 975 (1978); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 66, (2nd Cir. 1979). This same fear applies to the workplace. Employers and employees cannot be effective if they constantly fear that someone – whether management or an employee – is surreptitiously recording their conduct. Quite simply, secret taping is inappropriate conduct. *See Minton v. Lenox Hill Hosp*., 160 F.Supp.2d 687, 696 (S.D.N.Y. 2001)(recognizing secret tape recording of workplace conversations to be inappropriate conduct for a supervisory employee).

Courts across the country have denounced secret taping in the workplace. The Northern District of Georgia held that secretly recording supervisors ***was not protected union activity***. *Douglas v. Dekalb County, Georgia*, 2007 WL 4373970 at *4 (N.D.Ga. 2007). Covert taping was a legitimate reason for termination. *Douglas* at *4. The court explained that candor, trust, and confidentiality were undermined where co-workers feared being secretly recorded. *Id* at *5. The Western District of Michigan also found that the secretly recording conversations with supervisors constituted reasonable grounds for termination. *See Wetter v. Munson Home Health*, 199 U.S. Dist. LEXIS 15683 at *27 (W.D. 1999).

Similarly, ***attempts*** to secretly record reflect deception and dishonesty, undermining the mutual trust essential to harmonious working relations. *See Danca v. K-Mart Corp*., 2000 WL 33407239 at *5 (Mich.App. 2000)(emphasis added). Like *Douglas*, *Danca* court upheld the

suspension and demotion of an employee, finding that secret taping activity provided a legitimate, non-discriminatory basis for such discipline. *Id*.

Additionally, the Western District of Michigan in *Cutts v. McDonalds*, 281 F.Supp.2d 931 (W.D.Mich. 2003), upheld even more severe discipline for ***attempting*** to secretly record. In *Cutts*, an employee was terminated for attempting to tape-record a meeting with the Chief Operating Officer. The court held that secretly recording a meeting with a supervisor is a legitimate, non-discriminatory justification for termination. *Id.* at 934.

Unions have also decried secret taping. In *Consolidated Edison Co. of NY*, 286 NLRB 1031, 1032 fn. 5 (1987), a dissident union member secretly recorded a grievance meeting. The union chastised the individual, circulating a leaflet stating that the secret taping was "dishonorable conduct" and "dirty tricks." *Id*. Rather than championing Smith's actions, Hawaii Newspaper Guild should have condemned his dishonorable misconduct.

Further, the Colorado Supreme Court labeled surreptitious tape recording as suggestive of trickery and deceit. *See People v. Selby,* 198 Colo. 386, 390, 606 P.2d 45 (Co. S.Ct. 1979). The Board cannot condone Smith's conduct as any sort of protected activity. Failing to reverse the ALJ's finding on this matter is tantamount to sanctioning unfettered spying and will lead to workers setting traps in an effort to catch something on tape. Clearly, this result would create labor strife and undermine the Act's purpose.[45]

[45] The true irony of this case is that the General Counsel pursued alleged violations against *Hawaii Tribune-Herald* for "creating the impression of surveillance" by interviewing employees during an investigation of misconduct, yet the General counsel championed a case based on an employee ***actually engaging in concealed surveillance*** as being protected by the Act. The Board recently ruled that an employer violates the Act by installing secret cameras. *See Anheuser-Busch, Inc.*, 351 NLRB No. 40 (2007). This case, demonstrates an agenda with no regard for consistency or common sense.

The Board deemed secretly taping one's employer unprotected and would reasonably be expected to arouse some admonishment. *See Garvey Marine*, 328 NLRB 991, 1019 (1999)("The secret tape recording of one's employer would reasonably be expected to arouse some admonishment regardless of the history of leniency."). The ALJ disregarded precedent.

In *Sam's Club*, 342 NLRB 620, 633-34 (2004), Former-Chairman Battista opined, in his dissent, "secretly bringing a tape recorder to work to make surreptitious recordings of conversations is qualitatively different than openly having a tape recorder at work. ***The covert taping was not itself protected activity.*** Discipline for taping activity like that engaged in by [the employee] might well be a legitimate reason for the employer to discipline an employee, in the absence of other, unlawful motivation." (emphasis added). The ALJ in *Sam's Club* similarly found that covert tape recording was a legitimate reason to discipline an employee, and the Board did not take issue with this finding, nor did the General Counsel claim that secret taping was protected. *Id* at 622, fn. 1, 634. It was error for the ALJ to disregard *Sam's Club*. (Dec. at 19: 26-28).

Further, the ALJ's reliance on *Williamhouse of Cal., Inc*., 317 NLRB 699 (1995) and *McAllister Bros*., 278 NLRB 601 (1986), where secretly recorded conversations were admitted as rebuttal evidence is irrelevant to the issue. Evidently standards[46] are not a barometer for misconduct. While it may provide an accurate reflection of what took place, that does not make the underlying act of taping acceptable.[47]

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[46] Yet the ALJ precluded production of the secret recording, undermining his own conclusion.

[47] Otherwise, any and all forms of surveillance would be condoned by the Board, as such recording of activities would provide the Board with the best evidence of what took place. The Board, however, has rejected all types of surveillance. *See, e.g. Anheuser-Busch, Inc.*, 351 NLRB No. 40 (2007).

The dishonest manner by which Smith achieved his goal was egregious enough to remove him from any conceivable protections afforded by the Act. The general rule is "obey now, grieve later." *See Specialized Distribution Mgmt.*, 318 NLRB 158, 161 (1995). In *Specialized Distribution*, the Board adopted the ALJ's recommended Order, finding that employees failed to follow the "obey now, grieve later" tenet, and were insubordinate. *Id*. Smith's failure to obey Bock's directive to meet without a witness was insubordination which therefore provided *Hawaii Tribune-Herald* a non-discriminatory reason to discipline Smith.

3. Smith's Actions Do Not Constitute Concerted Activity.

The ALJ erred in finding that Smith engaged in concerted activity on March 3, 2006. (Dec. at 19:1-2). Concerted Activity has its limits. *See NLRB v. Jones and Laughlin Steel Co*., 301 U.S. 1, 33, 57 S.Ct. 615, 81 L.Ed. 893 (1937); *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 51, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *NLRB v. City Disposal Sys*., 465 U.S. 822, 835, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984); *Metropolitan Life Insur. Co. v. Mass*., 415 U.S. 724, 752-757, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). In *City Disposal Sys*., the Court stated that inquiry as to what constituted "concerted activities" depended upon "the precise manner of which particular actions of an individual employee must be linked to the actions of fellow employees." *City Disposal Sys*. at 831. In *Meyers I and II*, the Board stated:

> [I]n general to find an employee's activity to be concerted, we shall require that it be engaged in, with, or on the authority of other employees, and not solely behind and on behalf of the employee himself.

Meyers II, 281 NLRB 884 (1986), (citing *Meyers I*, 269 NLRB 493, 497 (1984)).

Smith did not act on any other employee's behalf, or on behalf of the Guild. There is no evidence that Smith was trying to initiate, induce or prepare for group action; there was also no evidence that he was bringing group complaints to management. There was no evidence that his

actions were an effort to protect the *Weingarten* rights of others, or even that the discussion prior to Smith's meeting with Bock touched on protecting the rights of others. Smith telephoned Wayne Cahill; Cahill did not direct him to secretly record the meeting. (Tr. 837). Cahill only told Smith to take notes. (Tr. 534, 837).[48] Smith exercised his own personal judgment and made the decision to secretly record Editor Bock on March 3, 2006. (Tr. 544, 561). In fact, Smith spent twenty minutes thinking about whether to record the meeting, despite being told that his meeting did not trigger *Weingarten* rights. (Tr. 123). The ALJ cited *Whittaker Corp*., 289 NLRB 933 (1988) (Dec. at 18: 22), but failed to include the following relevant qualification that "individual action is concerted as long as it is engaged in with the object of initiating or inducing … group action…" *Whittaker Corp*. at 934, (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964)). A person must act for the purpose of inducting or furthering a group action. *See Blaw-Knox Foundy & Mill Machinery Inc. v. NLRB*, 646 F.2d 113, 116 (4th Cir. 1981). Smith failed this test.

Smith's concern was purely personal; personal missions are not deemed concerted activity under any test. *See Blaw Knox* at 116, (citing *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949)). Smith's discipline had no effect on encouraging or discouraging membership in the Guild. Quite frankly, there was nothing concerted about his taping.

In *Dana Corp*., 318 NLRB 312, 312 (1995), the Board dismissed a complaint involving an employee who was discharged for taping a meeting with his supervisor, despite the supervisor's order to turn the recorder off. The Board found that the taping was neither union-

[48] The ALJ also impermissibly allowed hearsay testimony from Cahill regarding what Smith told Cahill about Armstrong's meeting. (Tr. 727-729). Unfortunately, the ALJ also improperly sustained an objection to a question to Cahill regarding whether he ever secretly recorded. (Tr. 841: 11-22). This question was relevant to whether secret taping is generally considered unacceptable conduct. (Tr. 727: 15-25).

related, nor protected. *Id.* at 316. Instead, it was insubordinate behavior.[49] *Id*; see also *Douglas*, supra (secretly recording supervisors is not union activity).

The ALJ committed error by not relying on *Dana Corp*. In *Dana Corp*., the employee testified that he wanted to record the meeting to protect himself. *Dana Corp.* at 316. This was Smith's explanation. (Tr. 507: 6-16). Also, in both *Dana Corp.* and the instant case, there was no evidence that the employer had ever permitted an employee to tape record a meeting. *Id* at 316-17. The unrebutted testimony of Bock was that secret recording had never before occurred. (Tr. 1061: 10-15). *Dana Corp*. is controlling authority and justified the actions taken by *Hawaii Tribune-Herald*. The Board should reverse the ALJ's erroneous conclusion, and find that Smith's secret taping was not concerted activity.

4. Smith's Warning on March 3, 2006 Was Pre-Determined.

The ALJ's finding that the meeting on March 3, 2006 triggering *Weingarten* rights was gross error. (Dec. at 18:41-49). Bock delivered a verbal warning to Smith about Smith's productivity based on a count Bock had already performed. (Tr. 490). Smith disagreed with Bock's count and Bock suggested that Smith do his own count. (Tr. 492) Bock never stated that he would hold off on providing the verbal warning until Smith completed his own story count. The verbal warning stood despite Smith's disagreement over the reasonableness of the warning. There was nothing "open to further investigation." (Dec. at 18: 45-46).

The ALJ cited *Baton Rouge Water Works*, 246 NLRB 995, 997 (1979), but omitted a clearly relevant passage:

[49] The ALJ erred by sustaining an objection to a question about whether Smith brought a recorder into the meeting to use as a witness, against Bock's instruction that no witnesses would be allowed. (Tr. 545). This was clearly relevant to Smith's insubordination.

> [a]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline.

Bock had already determined and planned a verbal warning as discipline for Smith's failure to meet the one byline per day requirement, prior to their meeting. (Tr. 1025-1026; G.C. Ex. 3).

Further, in *Baton Rouge Water Works*, the Board explained, "the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which *Weingarten* protections apply." *Baton Rouge Water Works* at 997. Bock's statement about Smith performing his own story count was not an investigation by Bock and did not "convert" the meeting.

The ALJ cited *Becker Group, Inc*., 329 NLRB 103 (1999), for the proposition that "where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies." (Dec. at 18: 46-48). This was inapplicable to the instant case. Bock asked Smith no questions to bolster his decision. Bock informed Smith of the results of the story count and provide a pre-determined verbal warning. *See Becker Group* at 113. Smith sought additional information.[50] There was no evidence that Bock intended to conduct any further investigation or seek information from Smith; no *Weingarten* rights applied. *Id*. The ALJ's finding that Bock left open further investigation was error.

[50] There was no charge or complaint allegation regarding the story count, and therefore, the inquiries by Counsel for General Counsel into story count methodology generally, as well as specifically as to Smith's questions to Bock on March 3, 2006 were irrelevant to the charges involving Smith and should not have been allowed. (Tr. 1108-1109).

6. Lack of a Policy Does Not Matter.

The lack of a policy at *Hawaii Tribune-Herald* prohibiting secret taping prior to March 3, 2006, did not mean that *Hawaii Tribune-Herald* condoned secret taping or that it could not institute such a policy. In *PHC-Elko, Inc., d/b/a Elko Gen. Hosp.*, 347 NLRB No. 123 (Aug. 31, 2006), the Board said:

> To say that an employer must show a prior instance of similar misconduct would preclude an employer disciplining an unprecedented wrong. We reject that approach.

Elko Gen. Hosp., slip op. at 3. That is exactly what happened here. There was unrebutted testimony at the hearing that *Hawaii Tribune-Herald* had never known of any employee secretly recording in the workplace. (Tr. 1061). Smith's conduct created a new workplace situation that *Hawaii Tribune-Herald* had an obligation to address. As former-Chairman Battista stated in *Sam's Club*:

> Similarly, the fact that the Respondent had no rule or policy about surreptitious taping does not immunize the conduct from discipline. A rule or policy cannot envisage all types of misconduct in which an employee might conceivably engage. For example, an employer may not have an explicit rule or policy against burning down the plant, but surely that would not immunize the conduct from discipline.

Sam's Club at 622. Battista was spot-on in his analysis. This basic, common sense notion that an employer cannot foresee all potential activities was reiterated in *Koronis Parts, Inc*.:

> Every organization operates on the basis that personnel will exercise common sense when performing their jobs. Certainly, the Act does not oblige employees to formulate and publish rules prohibiting every conceivable unsafe practice which may be committed before disciplining an employee for engaging in obviously unsafe conduct. For example, no one could dispute that an employee could be disciplined for such egregious conduct as carrying a hot carbide bar while chasing after another employee through the building. ***The Act does not bar an employer from imposing discipline for such misconduct simply because there is no specific rule prohibiting it.***

Koronis Parts, Inc., 324 NLRB 657, 714 (1997) (emphasis added). Faced with Smith's unprecedented misconduct in the workplace, *Hawaii Tribune-Herald's* reaction in suspending Smith and instituting a ban on secret taping was more than reasonable.

Rights under Section 7 must in each instance be understood in relation to the concrete facts of a particular case. *See Texas Instruments, Inc. v. NLRB*, 637 F.2d 822, 830 (1st Cir. 1981). Based on the facts and case law, the inescapable conclusion was that Smith's misconduct was not protected activity. Not all conduct can, in some general sense, be characterized as an exercise of a right enumerated in Section 7. *Id*. Even concerted activity that constitutes insubordination or disloyalty may be found to fall outside the scope of the Act. *Id*. The instant case was a circumstance where the conduct failed to earn protection by the Act. The Board should reverse the ALJ and find secret taping to be unprotected activity.

I. *HAWAII TRIBUNE-HERALD* DID NOT VIOLATE THE ACT IN INVESTIGATING SMITH'S MISCONDUCT.

1. Hawaii Tribune-Herald *Engaged in a Reasonable Investigation of Employee Misconduct on March 9, 2006.*

The ALJ found that *Hawaii Tribune-Herald* violated Section 8(a)(1) of the Act by interrogating Smith, Sur, Ing and Loos on March 9, 2006. (Dec. at 20: 44-45). This was error. An employer has the right to investigate misconduct in the workplace. *See Manville Forest Prods.* at 391. *Hawaii Tribune-Herald* was within its rights to investigate. *See Woodview Rehab Ctr*., 265 NLRB 848, 847 (1982).

An employer is entitled to interrogate employees about unprotected activity. *See Ogihara America Corp*., 347 NLRB No. 10 at 7 (2006), citing *HCA/Portsmouth Regional Hosp*., 316 NLRB 919, 931 (1995). As Smith's secret recording of Bock was not protected conduct,

there were no unlawful interrogations. The interviews held on March 9, 2006 were part of a normal investigation of alleged misconduct.

The ALJ found that four employees – Smith, Sur, Loos and Ing – "agreed in concert" that Smith would secretly record his meeting with Bock, and that *Hawaii Tribune-Herald* violated 8(a)(1) by investigating Smith's misconduct. (Dec. at 18: 28-29, 33-38). The ALJ attempted to justify his conclusion by claiming that *Hawaii Tribune-Herald*'s interrogations failed to communicate the limits of the inquiry, and similarly failed to reasonably circumscribe the questioning in order to avoid unnecessary prying into employee's union and protected/concerted activities. (Dec. at 18: 38-42). The ALJ's initial premise was invalid; the resulted findings that stem from it were similarly without merit, constituting additional reversible error.

The Board decision in *Cook Paint & Varnish* held "we have been required to balance the right of employees to make common cause with their fellow employees against the need for an employer to maintain the orderly conduct of its business. Where the employer's questioning takes place in an investigatory context prior to disciplinary action, we have struck the balance in favor of the interests of the employer." *Cook Paint & Varnish Co.,* 246 NLRB 646, 646 (1979).

At the appellate level, the D.C. Circuit stated, "an employer can, without violating Section 8(a)(1), seek to compel its employees to submit to questioning concerning employee misconduct when the employer's inquiry is still in the investigatory stage and no final disciplinary action has been taken." *Cook Paint & Varnish Co*., 648 F.2d at 717-718; *See also, Service Technology Corp*., 196 NLRB 845 (1972); *Primadonna Hotel, Inc.*, 165 NLRB 111 (1967). The court added that a proper balance must be struck between the company's right to uncover improper conduct on the part of certain employees in its endeavors to maintain order in its business and the rights of those employees. *Id*. at 718, citing *Service Technology* at 847.

As a valued member in the Hilo community, the reputation of *Hawaii Tribune-Herald* and how its reporters and other employees conduct themselves is of the utmost importance. As stated in *Kroger Grocery & Bakery Co. v. Yount*, 66 F.2d 700, 703 (8th Cir. 1933):

> The right to the enjoyment of the good reputation to which one is entitled should be jealously guarded by the courts, but the protection of this right does not require that an employer be unduly limited or circumscribed in making a bona fide investigation of alleged dishonesty or other misconduct among his employees. It is in the interest of good morals as well as of sound business that such investigations be conducted; and an employer should not be penalized for communications made to his employees supposed to have knowledge of such matters, where they are made in good faith and for the honest purpose of discovering the truth or of protecting the business.

The wisdom in these words rings true to this day.

Hawaii Tribune-Herald was mindful of the balance referenced in *Cook Paint and Varnish* and *Service Technology*, and at no point overstepped its authority or rights in the investigation of the Smith's unprotected activity. *Hawaii Tribune-Herald* afforded each employee a *Weingarten* witness and kept the questioning limited to the March 3rd, 2006 incident, and secret taping generally, where appropriate.[51]

The Board held in *Bridgestone Firestone South Carolina*, that an employer did not unlawfully interrogate an employee when it investigated employee misconduct. *See Bridgestone Firestone* at 5. Relying on the totality of the circumstances approach and citing *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1989), the Board found that the company had a legitimate basis for investigating the employee's misconduct. *Id.* at 5. In making this determination, the Board noted that the company made reasonable efforts to

[51] It should be noted that during the hearing, the ALJ allowed hearsay testimony regarding the outcome of the interrogations during Cahill's testimony about a phone conversation with Bishop. It is during this section of Cahill's testimony that Counsel for General Counsel was also able to sneak in leading questions about whether the secret recording came up during the call between Bishop and Cahill. (Tr. 731)

circumscribe its questioning to avoid unnecessarily prying into the employee's union views, and the limitations of its inquiry were clearly communicated to the employee. *Id*.

Bock simply asked each employee what they knew about Smith's misconduct. Bock did not know the extent to which co-workers were involved; he needed to speak with the people Welsh had named. (Tr. 1027). It was obvious that the focus and extent of the inquiries centered only on the March 3, 2006 taping. Bock's inquiries were appropriately circumscribed. Further, as secret taping is unprotected misconduct, investigating such misconduct is not unlawful interrogation.

2. Hawaii Tribune-Herald *Had the Right to Interview Peter Sur as Part of its Investigation into Smith's Misconduct.*

Hawaii Tribune-Herald had the right to interview Sur as part of its investigation into Smith's misconduct. *See Ogihara Am. Corp.*, 347 NLRB at 7 (2006)(citing *HCA/Portsmouth Regional Hosp. at* 931). *Hawaii Tribune-Herald* had information suggesting Sur knew about Smith's surreptitious tape recording. *Hawaii Tribune-Herald* investigated Sur as part of a determination of whether Smith engaged in misconduct. Smith's misconduct was not protected, thus interviewing Sur about Smith's secret recording did not violate the Act. A suggestion that the Act prohibited *Hawaii Tribune-Herald* from investigating Smith's misconduct, by interviewing Sur, is nonsense. This allegation should be dismissed.

3. Hawaii Tribune-Herald *Had the Right to Interview Dave Smith as Part of its Investigation into Smith's Misconduct.*

Just as *Hawaii Tribune-Herald* had the right to interview Sur without violating the Act, *Hawaii Tribune-Herald* had the right to interview Smith without violating the Act. Smith was the employee who engaged in misconduct. Smith's defiant attitude in that investigatory meeting was

apparent from the testimony at the hearing.[52] Smith's dishonesty, in secretly recording Bock, was not protected, thus his subsequent interview about the misconduct was lawful. See *Ogihara Am. Corp., supra*. A suggestion that the Act prohibited *Hawaii Tribune-Herald* from investigating Smith's misconduct, strains credulity. This allegation should be dismissed.

4. Hawaii Tribune-Herald *Had the Right to Interview Chris Loos as Part of its Investigation into Smith's Misconduct.*

Hawaii Tribune-Herald lawfully interviewed Loos as part of its investigation. *See Ogihara, supra.* There was no evidence to demonstrate that the meeting involved anything other than an inquiry into Smith's misconduct.[53] The scope of the interview was limited, and unrelated to protected, concerted or union activities. The notion that *Hawaii Tribune-Herald* could not investigate workplace misconduct is absurd. This allegation should be dismissed.

5. Hawaii Tribune-Herald *Had the Right to Interview William Ing as Part of its Investigation into Smith's Misconduct.*

For the reasons explained regarding the interviews of Sur, Smith, and Loos, *Hawaii Tribune-Herald* had the right to interview Ing.[54] The allegation should be dismissed.

Further, Ing admitted that he and Smith knew secretly recording Bock was misconduct. Ing told Smith to ***conceal the recorder well***. (Tr. 616-17). That Ing said "conceal" and encouraged Smith to "put it where the sun doesn't shine" demonstrated that Smith and Ing realized that Smith's plan to secretly record Bock was dishonest, disloyal, and would result in

[52] The ALJ erred by sustaining an objection regarding what Smith assumed on March 9, 2006 after seeing Sur obtain a witness. (Tr. 541).

[53] Loos, in fact, followed Ing. The ALJ erred in the sequence of employees. (Dec. at 24: 25-27).

[54] The ALJ got the order of employee interviews wrong in his Recommended Order. Ing followed Smith, not Loos. (Dec. at 11: 18-20).

discipline if *Hawaii Tribune-Herald* caught Smith. Ing's words constituted an admission that Smith's misconduct was improper.

J. PETER SUR'S CONDUCT JUSTIFIED THE DISCIPLINE IMPOSED.

1. By Providing Smith the Recorder, Sur Engaged in Misconduct.

The ALJ erred by finding that Peter Sur's discipline violated Sections 8(a)(1) and (3) of the Act because Smith's misconduct was protected. (Dec. at 33: 5-14). These findings cannot stand; the Board should correct these errors.

First, as discussed supra, Smith's meeting on March 3, 2006, was not a *Weingarten* opportunity.[55] Sur could not have engaged in union activities to protect *Weingarten* rights when there were no such rights! Second, since secret taping is not protected activity, it was error to find that the planning of such unprotected activity was protected.

Sur's discipline simply reflected a measured response to his inappropriate involvement in Smith's surreptitious taping. Sur was contrtie and apologized. There was no evidence of unlawful intent or anti-union animus designed to chill the exercise of employee rights.[56]

K. DAVE SMITH'S CONDUCT SUBJECTED HIM TO DISCIPLINE.

1. Smith's Discipline Was a Legitimate Exercise of Employer Rights.

It was error for the ALJ to find that *Hawaii Tribune-Herald* violated Sections 8(a)(1) and (3) of the Act in disciplining and discharging Smith. (Dec. at 34: 20-21). The ALJ was wrong on the issue of whether Smith's conduct was concerted and protected; as such, the analysis with regard to Smith's discipline perpetuated these errors. *Hawaii Tribune-Herald* disciplined Smith

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[55] Again, the Guild, on October 31, 2006, withdrew its change in 37-CA-7081 alleging *Hawaii Tribune-Herald* unlawfully denied Smith a *Weingarten* representative on March 3, 2006. (G.C. Ex. 1(ooo), Internal Ex. 4).

[56] During Sur's testimony, the General Counsel was allowed to ask questions leading and/or beyond the scope to dig up something of value, despite objections by *Hawaii Tribune-Herald*. (Tr. 586, 596, 598).

because of multiple acts of misconduct that were insubordinate, defiant and violated common sense standards of decency.

Discipline of an employee is a matter left to the discretion of the employer. *See NLRB v. Consolidated Diesel Electric Co*., 469 F.2d 1016, 1025 (4th Cir. 1972). In a letter dated April 11, 2006, Editor David Bock explained why Smith was suspended on March 9, 2006:

- You were absolutely defiant in our meeting on March 9, 2006, about your misconduct. You not only admitted it, but, unfortunately, you seemed proud of it.

- Your secret taping of our March 3, 2006 meeting was also an act of insubordination. On March 3, 2006, I initially had a meeting with Jason Armstrong to inform him of my determination that his story productivity was not meeting our standard. When I convened that meeting, Jason Armstrong asked for a Weingarten witness. He was informed that this was not a Weingarten opportunity, and he was denied a witness, namely you. You, of course, knew that I would also be meeting with you to discuss your story productivity. You then, intentionally and with calculation, determined that you would maneuver around my direction to meet one-on-one with you and, in defiance of your supervisor, you decided to bring a witness to the meeting in the form of a hidden voice recorder. Your surreptitious taping of our meeting is the equivalent of bringing in a witness in violation of my instructions.

- I had a definite expectation that my meeting with you to inform you merely of your story count would be a meeting with you alone. Your surreptitious taping in and of itself intruded upon my supervisory privacy and my management right to meet with you without the presence of a Weingarten representative. The context of your surreptitious tape recording, in collaboration with your co-workers, undermines my authority and was disloyal.

(G.C. Ex. 3; Tr. 1036). Further, the letter explained that Smith would have to regain the trust of *Hawaii Tribune-Herald*, because "at the present time, we do not trust you." (*Id*).

Membership in the union did not immunize Smith against discipline for his personal misbehavior. *See Winston-Salem Journal v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005)(union vice president legitimately discharged for misconduct). An employer may also discharge an employee for disobeying a lawful order. *See Colburn Elec. Co*., 334 NLRB 532, 548 (2001). Smith was defiant and insubordinate on March 3, 2006, when Editor Bock called him in for a

meeting that was not a *Weingarten* opportunity, and Smith chose to bring a witness into the meeting in the form of a concealed tape recorder. Smith's attitude was similarly defiant in his March 9, 2006 meeting with Bock and Palmer. It is not an unfair labor practice to discharge an employee for exhibiting a defiant and insulting attitude towards his supervisor. *Id* at 212, (citing *Maryland Dry Dock v. NLRB*, 183 F.2d 538, 540 (4th Cir. 1950)).

Smith's actions throughout the month of March and April 2006 constituted defiance and insubordination. *Hawaii Tribune-Herald* did not discipline Smith for mistakenly trying to be a witness. Smith refused to obey Bock's command to meet on March 3, 2006 without a witness. Smith refused to turn over the recorder during the investigatory meeting on March 9, 2006. Sur authorized Editor Bock to retrieve the recorder. (Tr. 588, 1044; G.C. Ex. 3). Smith refused to attend the March 17, 2006 meeting per Bock's instruction.[57] (Tr. 1060).[58] Smith again refused to provide the recorder to Bock despite a letter dated March 22, 2006, ordering Smith to reply directly to Bock about meeting on March 27, 2006, and to bring the recorder. Smith failed to notify Bock that he would attend the March 27, 2006 meeting where Smith yet again failed to produce the recorder.[59] Smith's insubordinate conduct was further evidenced by communication with Cahill orchestrating a scheme to keep the recorder from Bock. (Tr. 1067; R. Ex. 362).

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[57] How the ALJ found that Smith did not refuse to meet is completely lacking in realty. (Dec. at 33: 42; Dec. at 44:14).

[58] Cahill's involvement began on March 3, 2006 when Smith called him regarding Jason Armstrong's meeting with David Bock. (Tr. 837). His involvement continued on March 17, 2006 when he indicated he was Smith's union representative, and on March 27, 2006, when he attended the meeting with Smith, Bock and Crawford. (Tr. 732, 1056). Based on Cahill's intimate involvement in this matter, the ALJ should have allowed *Hawaii Tribune-Herald* to find out if Cahill told Smith a grievance had been filed on his behalf. (Tr. 536).

[59] The ALJ improperly overruled an objection by *Hawaii Tribune-Herald* regarding what discussion of policies, if any, took place at this meeting. (Tr. 747).

Smith refused to contact Bock on April 10, 2008, as requested, and when Smith finally decided to meet Bock on April 11, 2006, he brought an entourage carrying signs and shouting at Bock. (Tr. 1067). Smith's wife even shoved a camera in Bock's face! (Tr. 1067). Smith initially refused to meet with Bock, saying he was only told to meet Bock at the front door, and insisted that the meeting occur on the steps. (Tr. 1067). Bock had to give Smith an order to come in and meet. (Tr. 1067). Smith was, again, defiant, saying that he did not even have to be at *Hawaii Tribune-Herald*'s facility. (Tr. 1068). Smith, again, objected to going inside and only relented after Bock gave him a direct order. (Tr. 1068-69). It is inconceivable that based on this series of events, the ALJ failed to find that *Hawaii Tribune-Herald* had a legitimate basis to discipline Smith.

2. The General Counsel Failed to Meet its Burden of Proof.

The Act does not protect employees from their own misconduct or insubordination. *See National Semiconductor* at 981, citing *Guardian Ambulance Serv.*, 228 NLRB 1127, 1131 (1977). Therefore, the Act does not shield an employee against the consequences of insubordinate behavior if the discipline was not motivated by anti-union animus. *See Winston-Salem Journal* 394 F.3d at 212 (citing *NLRB v. Brown*, 380 U.S. 278, 286, 85 S.Ct. 980, 13 L.E.2d 839 (1965)). A discharge, whether the cause be good or bad, and whether it be deemed harsh or lenient discipline, offends the Act ***only*** if it was discriminatorily motivated on account of union activity. There must be an unlawful intent in the discharge. *See Consolidated Diesel Electric Co.* at 1024, citing *Brown* at 286.

The ALJ erred in finding that Smith's suspension and discharge was unlawful. (Dec. at 34: 20-21). The burden of establishing such discriminatory motive or unlawful intent fell on the

General Counsel. *See Consolidated Diesel Electric Co*. at 1024. The General Counsel had to establish by a preponderance of evidence that:

1. Smith engaged in union activities;

2. *Hawaii Tribune-Herald* knew of Smith's union activities;

3. *Hawaii Tribune-Herald* was motivated by union animus in suspending and discharging Smith; and

4. Smith's discharge had the effect of encouraging or discouraging membership in a labor organization.

The General Counsel failed to satisfy this burden. *Hawaii Tribune-Herald*, in writing, articulated clearly its reasons:

- You were absolutely defiant in our meeting on March 9, 2006 about your misconduct. You not only admitted it, but, unfortunately, you seemed proud of it.

- You initially were not candid with us about the voice recorder. At first, you stated that you did not know where the recorder was located; then you said that the recorder was at your home; finally, you admitted that Wayne Cahill had possession of it. My letter that you received on March 17, 2006, also directed you to bring the voice recorder to us. Your failure to bring the voice recorder and your failure to meet with me are acts of insubordination.

- Your secret taping of our March 3, 2006 meeting was also an act of insubordination. On March 3, 2006, I initially had a meeting with Jason Armstrong to inform him of my determination that his story productivity was not meeting our standard. When I convened that meeting, Jason Armstrong asked for a Weingarten witness. He was informed that this was not a Weingarten opportunity, and he was denied a witness, namely you. You, of course, knew that I would also be meeting with you to discuss your story productivity. You then, intentionally and with calculation, determined that you would maneuver around my direction to meet one-on-one with you and, in defiance of your supervisor, you decided to bring a witness to the meeting in the form of a hidden voice recorder. Your surreptitious taping of our meeting is the equivalent of bringing in a witness in violation of my instructions.

- I had a definite expectation that my meeting with you to inform you merely of your story count would be a meeting with you alone. Your surreptitious taping in and of itself intruded upon my supervisory privacy and my management right to meet with you without the presence of a Weingarten representative. The context

of your surreptitious tape recording, in collaboration with your co-workers, undermines my authority and was disloyal.

- After your suspension, I determined that I needed to have a second meeting with you to complete my investigation. You did not return repeated telephone calls that I made in an effort to contact you to schedule this meeting. I was forced to send you, by Express Mail, a letter ordering you to meet with me at 5:00 p.m. on March 17, 2006.

- You refused to meet with me on March 17, 2006 at 5:00 p.m. as directed. You subsequently admitted that you had received my letter by approximately 3:00 p.m. on March 17, 2006, giving you enough time to drive to *Hawaii Tribune-Herald* for the meeting. You did not show up for the meeting; you did not even give me the courtesy of a telephone call to tell me either that you could not make the meeting or that you wanted to reschedule it. Only much later did you claim that the reason you did not call me on March 17, 2006 was because Wayne Cahill was not available to be your Weingarten representative. There are a couple of problems with your approach. First, until you appear for the meeting, there is no way for you to know whether or not it is a Weingarten witness opportunity for you. Secondly, your Section 7 right to a Weingarten representative is not a right to a particular, named individual. Routinely in our workplace, when employees are entitled to a Weingarten representative, they have selected a co-worker who is a union steward. You do not have any right to delay a meeting with your supervisor for this reason.

- To compound your misconduct of secret taping, you gave Peter Sur's property (i.e. the voice recorder) to the union. You admitted to me that you did not have Peter Sur's permission to give his personal property to the union. Peter Sur had authorized me to take possession of his voice recorder, and that is why I gave you direct orders to bring it to me.

- In another letter, dated March 22, 2006, I stated that I wanted to have a meeting with you at 4:00 p.m. on March 27, 2006. That letter directed you to contact me directly and to turn over the recorder. You did neither. Until you actually appeared on March 27 at 4:00 p.m., I had no idea whether or not you would be there. You had not contacted me directly, as instructed, and you did not produce the voice recorder.

- By the time of our second meeting on March 27, 2006, you had had over two weeks to think about your misconduct of March 3, 2006. After having had this time to reconsider your actions, you remained defiant. Your statement was that you had done nothing wrong. You made this statement in spite of the fact that I verbally told you on March 9, 2006 that secret tape recording was serious workplace misconduct and a serious breach of trust and would not be tolerated. Your comments on March 27, 2006 indicate that you are refusing to take direction from your supervisor. This is disrespectful of the authority of your supervisor. In

> our meeting on March 27, 2006, you acknowledged the existence of Ted Dixon's memorandum that was distributed regarding secret taping; yet because you had not actually seen it, you remained in denial. You refused to accept my verbal direction given to you on March 9, 2006, which you received prior to the dissemination of Ted Dixon's memorandum.
>
> It is our decision that you will remain suspended without pay until you sign an acknowledgment that, upon returning to work, you will not secretly tape record in the workplace. At the present time, we do not trust you. You will have to work to earn back our trust. Quite frankly, we gave serious consideration to discharging you. Your long service with *Hawaii Tribune-Herald* and a relatively clean disciplinary record, before the surreptitious taping, were mitigating circumstances in your case. However, if you have not signed that acknowledgment form by April 21, 2006, we will have no choice but to discharge you.

(G.C. Ex. 3).[60]

When a cause other than union activity exists for the discharge, the legal motive cannot be based merely on the discharged employee's union organizational activity; by offering only such proof, the General Counsel does not sustain his burden. *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 131 (4th Cir. 1979). In the instant case, the General Counsel established that Smith was a member of the Guild, and that he had participated in collective bargaining negotiations. Smith was not suspended or disciplined because he was in the union. He was disciplined for misconduct, as allowed by Section 10(c) of the Act.

When cause exists the General Counsel must show "an affirmative and persuasive reason why the employer rejected the good cause and chose the bad one … evidence which gives equal support to inconsistent inferences" is not enough. *Florida Steel* at 131-132. Were the rule otherwise, "any employee who had been guilty of conduct warranting discharge could protect himself by openly engaging in union activities, and run for luck …" (*Id.* at 132). The Fourth Circuit further explained:

[60] The ALJ failed to mention that *Hawaii Tribune-Herald* gave Smith this letter. This was error.

> An employer has the right to discharge an employee for any reason whether it is just or not, and whether it is reasonable or not, as long as the discharge is not in retaliation for union activities or support. The Board cannot substitute its judgment for that of the employer as to what constitutes reasonable grounds for discharge. The question for proper discipline of employee is a matter left to the discretion of the employer. Membership in a union does not immunize employees against discharge for reasons other than union hostility.

Consolidated Electric 469 F.2d at 1025, citing *NLRB v. Ogle Protection Serv. Inc.* 375 F.2d 497, 505-506 (6th Cir. 1967), cert. denied 389 U.S. 843 (1967). There was no evidence presented that *Hawaii Tribune-Herald* retaliated against Smith. *Hawaii Tribune-Herald* had legitimate reasons to discipline Smith.

The Board is also limited in its role to determining whether there was a discriminatory motive behind an employee's discharge. *See Consolidated Diesel Electric*. at 1025. Insubordination and refusal to obey instructions constitute reasonable grounds for disciplining an employee; discharge for insubordination or refusal to obey instructions is perfectly lawful. *Id*. at 1025, citing *Visador Co. v. NLRB* 386 F.2d 276, 281 (4th Cir. 1967); *NLRB v. Wix Corp*., 309 F.2d 826, 833 (4th Cir. 1962); *NLRB v. Camco Inc.* 369 F.2d 125, 129 (5th Cir. 1966); *Nicks v. NLRB*, 418 F.2d 1001, 1009 (5th Cir. 1969). *Hawaii Tribune-Herald* had the right to discipline and ultimately, discharge, Smith for his defiant and insubordinate actions that began on March 3rd, 2006, and continued into April 2006.

There was zero evidence of animus towards Smith because of any union activity. The ALJ's finding that *Hawaii Tribune-Herald* violated Sections 8(a)(1) and (3) was not based on any proof provided by General Counsel. Had the ALJ properly found that Smith's secret taping was unprotected activity, he would not have found that the discipline and discharge violated the Act. By correcting this error and finding that secret taping was unprotected, the Board should

also reverse the ALJ's finding that the discipline and discharge that flowed from the unprotected activity were lawful.

3. Dave Smith Voluntarily Resigned and is Not Entitled to Reinstatement.

Dave Smith had the opportunity to come back to work. He chose not to come back. In fact, he would be working at *Hawaii Tribune-Herald* today if he would have been willing to acknowledge that secret taping in the workplace was not tolerated at *Hawaii Tribune-Herald* and would not be tolerated upon his return to work. (Tr. 538; G.C. Ex. 3). The letter he was asked to sign on April 11, 2006 asked that he agree to not secretly tape in the future. In fact, he was asked to return on April 18, 2006 and was given until April 21, 2006 to sign the acknowledgment. (Tr. 1071-1072; G.C. Ex. 3). Editor Bock wanted Smith to come back. (Tr. 1069-1072). Bock wanted more Dave Smith stories. What Bock (and *Hawaii Tribune-Herald*) didn't want, was for Smith to continue to secretly tape conversations.

These terms were unacceptable to Smith, and by failing to even respond directly to Bock after April 11, signified his refusal to oblige *Hawaii Tribune-Herald*'s rules. Smith's refusal to return to work was not evidence of anti-union animus. *Hawaii Tribune-Herald* cannot be held accountable for setting legitimate expectations with which an employee refuses to comply. Smith refused to respond to Bock's April 11, 2006 letter.[61] (Tr. 1072; G.C. Ex. 3). His failure to resume employment with *Hawaii Tribune-Herald* and not secretly record (a rule that had been instituted following his suspension), constituted voluntary resignation.

L. THE RULE AGAINST SECRET TAPING IS A LEGITIMATE EXERCISE OF EMPLOYER PREROGATIVE.

[61] The Guild withdrew its charge in NLRB Case No. 37-CA-7187, alleging that *Hawaii Tribune-Herald* retaliated against Smith because Smith sought assistance of Guild representative Cahill; the Guild also withdrew its charge in NLRB Case No. 37-CA-7113, alleging that *Hawaii Tribune-Herald* engaged in direct dealing with Smith. (G.C. Ex. 1(ooo) Internal Ex. 5, 6).

The ALJ found that Publisher Dixon's March 15, 2006 letter (GC Ex. 16) prohibiting secret tape recording at *Hawaii Tribune-Herald* was an attempt to restrict its employees' exercise of Section 7 rights and violated Section 8(a)(1) of the Act. (Dec. at 27: 18-20). Smith's conduct was not concerted or protected. As such, *Hawaii Tribune-Herald* did not violate the Act when it enacted a rule meant to prohibit deceitful, dishonest activity.

Employees have no Section 7 right to engage in deceitful conduct that gives rise to legitimate, non-discriminatory termination. In *Lafayette Park*, the Board explained that to determine whether mere maintenance of certain work rules violated Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). In *Albertson's*, the Board recently found a generic "other misconduct rule" did not violate the Act. *Albertson's*, 351 NLRB No. 21 at *7 (2007). The Board found that the employees reasonably believed that this rule was "intended to reach serious misconduct, not conduct protected by the Act." *Id*.

Based on *Lafayette Park*, the Board should reverse the ALJ's finding of a violation of the Act regarding the rule prohibiting secret recording. The Board must: (1) give the rule a reasonable reading, (2) refrain from reading particular phrases in isolation, and (3) not presume improper interference with employee rights. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park* at 825, 827. It is entirely reasonable for the employees at *Hawaii Tribune-Herald* to believe that a rule prohibiting secret taping was intended to reach serious misconduct that is not protected by the Act.

It is unreasonable to conclude that a rule prohibiting the surreptitious recording of a coworker or supervisor reasonably tends to chill the exercise of Section 7 rights, particularly

when there is no explicit Section 7 right to secretly record. Just like the Board could not reasonably read the "other misconduct" rule in *Albertson's* to encompass Section 7 activity, the Board should not read the secret taping prohibition rule put out by Dixon on March 15, 2006 as encompassing Section 7 activity. *Albertson's* at *7. As the Board held in *Lutheran Village*:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Lutheran Village at 647.

Like in *Lutheran Village*, reasonable employees at *Hawaii Tribune-Herald* would infer that the *Hawaii Tribune-Herald's* "purpose in promulgating the challenged rules was to ensure a "civil and decent" workplace, not to restrict Section 7 activity." *Id*. As the D.C. Circuit noted, "***it defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace***." *Adtranz ABB Daimler-Benz Transp., N.A., Inc., v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001)(emphasis added). Smith's conduct jeopardized the balance of trust and order that *Hawaii Tribune-Herald* felt was required to have an effective workforce. Based on what is reasonable, the Board should conclude that this rule prohibiting secret taping does not reasonably tend to chill the exercise of Section 7 rights, and correct the ALJ's error.

M. BUTTONS AND ARMBANDS LACKING UNION INSIGNIA DO NOT CONSTITUTE PROTECTED ACTIVITY.

The ALJ found that *Hawaii Tribune-Herald* violated Sections 8(a)(1) of the Act by prohibiting employees from wearing buttons that said, "Bring Hunter Back" and non-discript red armbands. (Dec. at 26: 12-14, 38-42). This was reversible error. The ALJ's analysis overlooked one key element: neither the button nor the armband contained union insignia.

These accessories worn by the *Hawaii Tribune-Herald* employees did not constitute union insignia because there were no markings that reflected they were union-based. The only notations on the pin were three words, "Bring Hunter Back." (G.C. Ex. 8). *Hawaii Tribune-Herald* was not provided with any notice or explanation from the Union regarding the purpose of the button. Likewise, *Hawaii Tribune-Herald* was not informed about red armbands that lacked context, text or a union logo. (Tr. 1086).[62]

The ALJ ignored these crucial facts in imputing constructive knowledge to *Hawaii Tribune-Herald*. (Dec. at 25: 46-47). General Counsel offered no evidence to suggest that *Hawaii Tribune-Herald* knew or should have known, the purpose of the buttons and armbands. Ironically, the ALJ made *Hawaii Tribune-Herald*'s own case by inserting into his opinion the fact that *Hawaii Tribune-Herald* had not prohibited employees from wearing t-shirts with the union logo and the message: "A fair contract. Nothing less." That article of clothing contained a union logo and spoke to a labor dispute. The buttons and armbands, however, did not. *Five Star Transportation* 349 NLRB No. 8 (2007), provides guidance on these buttons and armbands. The buttons and armbands, themselves, had to be examined to determine if they were protected. *See Id.* at 4 ("... we determine whether certain communications are protected by examining the communications themselves.").[63] Former Chairman Battista noted in his dissent in *Endicott Interconnect Technologies*, 345 NLRB No. 28 at *10 (2005):

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[62] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (which held that mere exposure of customers to union insignia did not constitute a special circumstance justifying the prohibition of such insignia was inapplicable).

[63] And, in *Five Star*, the examined letter generally referenced safety concerns. *Five Star* at 4. The Board recognized that the purported concerted activity was "so attenuated that [it] cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id*. (quoting *Eastex Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978)). The buttons and armbands, likewise, were too attenuated to be protected by the mutual aid or protection clause.

> Accordingly, I would find that both of White's communications were unprotected by the Act because they failed to reference an ongoing labor dispute and because they were disloyal to the Respondent. ... The Respondent was, therefore, fully within its rights to discipline White because of the November 16 article, and to discharge him for cause because of the December 1 posting.

The buttons and armbands[64] failed to affiliate the union, or any connection to a labor dispute.

In *NLRB v. Harrah's Club,* 337 F.2d 177, 179 (9th Cir. 1964), the court stated "we do not think that the Supreme Court intended to erect this into a rule which makes the wearing of union buttons per se a guaranteed right." (noting *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945)). The *Harrah's* court explained that wearing buttons (in that case the buttons bore union insignias, a significant difference from the instant case), "must be evidence of a purpose protected by the act – i.e. collective bargaining or other mutual aid or protection." *Id*. In the present case, there was no nexus between these items and protected activity.

At the hearing, Nako and Ing testified that they wore the buttons in protest of Hunter Bishop's termination. (Tr. 369, 370, 642, 644). At best, this signified a contract dispute. The wearing of these buttons, then, constituted self-help. Where a CBA has a grievance and arbitration procedure, unless the parties expressly agree that arbitration is not the exclusive remedy, the grievance procedure is the exclusive remedy for resolving contract disputes. *See Hollins v. Kaiser Foundation Hospitals*, 727 F.2d 823, 825 (9th Cir. 1984)(Per Curiam). The CBA ***had*** a grievance and arbitration provision to resolve all disputes. By taking matters into their own hands, these employees engaged in self-help and undermined the CBA. Self-help is not protected activity. The ALJ should be reversed.

N. THE CREDIBILITY DETERMINATIONS MADE BY THE ALJ WERE UNSOUND.

[64] The ALJ concluded that the armbands worn ***on March 13, 2006*** wore armbands "to protest Smith's termination," which was memorialized in an ***April 26, 2006*** letter. (G.C. Ex. 15).

Per *Marshall Engineered Products*, the Board should reverse unsound ALJ credibility findings. In the instant case, the ALJ did not resolve issues of credibility based "primarily on demeanor." *Marshall Engineered Products* at *2. Under *J.N. Ceazan Co*., 246 NLRB 637, 638 fn. 6 (1979), "the Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor … the Board itself may proceed to an independent evaluation of credibility.'" *Id.* at *2, fn. 7.

Dave Smith was particularly incredible. When asked, "knowing everything you know now, you still believe you did nothing wrong, on March 3, 2006, when you secretly tape-recorded Editor David Bock," Smith (after repeatedly stalling) answered, "That's true. I believe I did nothing wrong on March 3, 2006." (Tr. 528-29). Smith's testimony, in this regard, bordered on a pathological inability to admit fault. In *Wegmans Food Markets*, 351 NLRB No. 61 (2007), the Board dismissed a complaint alleging Wegmans violated the Act for terminating an employee purportedly engaged in protected, concerted activity (sending a letter complaining about working conditions) and for interrogating him about his union activities. The employee was a "singularly unreliable" witness who "appeared unable to admit any failings or accept personal responsibility for his actions." *Id*. at 7. This employee ***was just like Dave Smith***.

The Board also rejected the notion that the discharged employee was engaged in protected, concerted activity, finding that any evidence to support the General Counsel's argument was only found in the employee's self-serving testimony. *See Wegmans* at 9. The Board noted that during the meetings with his supervisors, the employee was hostile and argumentative, claimed that he was being followed around, and that the company was building a case against him. *Id*. Again, this ***was just like Dave Smith***.

Smith's answers during the investigation and during the hearing were incredibly self-serving. Smith lied to Bock, during the investigation. At the hearing, Smith testified that it did not occur to him (Smith) to tape the meeting until Sur gave him the recorder. However during Bock's investigation, Smith told Bock that recording the meeting was his idea.[65] Smith also admitted that Ing and Loos were nearby but that he did not recall what they were doing because he said he was kind of "preoccupied." (Tr. 455). This ran contrary to the testimony of Sur, Ing and Loos regarding the discussions they had with Smith prior to Smith's meeting with Bock. Quite frankly, Dave Smith was dishonest. Smith could not even admit receipt of the March 15, 2006 letter prohibiting secret taping. Smith's self-serving testimony should not be credited.

V. CONCLUSION

WHEREFORE, for any and all of the reasons stated above, and any additional reasons deemed appropriate, *Hawaii Tribune-Herald* respectfully requests that the Exceptions in NLRB Cases Nos. 37-CA-7043; 37-CA-7045; 37-CA-7046; 37-CA-7047; 37-CA-7048; 37-CA-7084; 37-CA-7085; 37-CA-7086; 37-CA-7087; 37-CA-7112; 37-CA-7114; 37-CA-7115; 37-CA-7186 be granted; the Decision and Recommended Order of the ALJ be overturned to the extent argued, and that the Consolidated Complaint be dismissed.

[65] The ALJ had to have discredited this testimony to find that the surreptitious taping was concerted.

Dated: May 5, 2008
Nashville, Tennessee

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing BRIEF IN SUPPORT OF THE EXCEPTIONS TO THE RECOMMENDED DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE was served via Federal Express on this 5th day of May 2008 on the following:

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